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THE

MERCHANTS' LAW BOOK;

BEING

A TREATISE ON THE LAW

OF

ACCOUNT RENDER, ATTACHMENT, BAILMENT, BILLS OF EXCHANGE AND PROMISSORY NOTES, CARRIERS, INSURANCE AGAINST FIRE, LETTERS OF CREDIT, PARTNERSHIP, PRINCIPAL AND AGENT, STOPPAGE IN TRANSITU, &c.

ILLUSTRATED BY MANY THOUSAND JUDICIAL DECISIONS,

AND DESIGNED EXPRESSLY FOR THE USE OF

MERCHANTS IN THE UNITED STATES.

BY WILLIAM GRIMSHAW,

COUNSELLOR AT LAW.

Philadelphia:

URIAH HUNT, No. 19 NORTH THIRD STREET.

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THE

MERCHANTS' LAW BOOK.

CHAPTER I.

ACCOUNT RENDER.

SECT. 1. Against whom, either by the common law, or by statute, this action lies.

2. Of the manner of bringing this action, with regard to the persons against whom it is brought.

3. The nature of the demands for which it may be brought.

4. In what cases, this is the proper action, or some other may be brought.

5. What will be a good bar to this action.

6. Of the auditors, and what shall be a good discharge before them.

7. Of the judgment and subsequent proceedings.

SECTION I.

Against whom, either by the common law, or by statute, this action lies.

BY the common law, the action of account-render lay only against a guardian in socage, bailiff, or receiver; and in favour of trade and commerce, by one merchant

against another; and for the executors of a merchant: for, between these, there was such a privity, that the law presumed them conusant of each other's disbursements, receipts, and acquittances.—1 Bacon's Abr. 32.

Account-render cannot be maintained by one partner against two others of his partners, unless there be a *joint* liability on the part of the defendants to render an account to the plaintiff.—15 Serg. & Rawle, 153.

It seems, that separate actions may be maintained against each partner.—ibid.

In account-render between partners, if these facts be proved: that a partnership existed—that the defendant was the acting partner—and that he received any part of the sum, from any of the persons mentioned in the declaration, he will uniformly be obliged to render an account.—1 Dallas, 340.

The statute of 13 Edw. I. gives an action of account to executors; the 25 Edw. III. to executors of executors; the 31 Edw. III. to administrators; and, by the statute of 4 Ann, actions of account may be brought against the executors and administrators of every guardian, bailiff, and receiver, and by one joint-tenant, tenant in common, his executors and administrators, against the other, as bailiff, for receiving more than his share, and against his executors and administrators.

Though an infant may be an executor, or charged in trover, being a tort; yet, if he be made factor, bailiff, or receiver, he shall not be accountable, during his infancy, either in law or equity, for the same reason that other acts of his bind him not; therefore, when a minor is appointed factor, his friends should give security for his accounting.—1 Bacon's Abr. 32.

This action does not lie by one executor against another, administering the affairs of the same estate; for the possession of the one is the possession of the other. —1 Selwyn's N. P. 3.

If I make J. S. my bailiff or receiver, and he make a deputy, I must bring *account* against the bailiff or receiver himself, and not against the deputy, for the receipt of the deputy was to the use of his master.—ibid.

An apprentice, by the name of an apprentice, is not chargeable in *account*.—11 Coke, 89. b.

Though he is not chargeable for the ordinary receipts upon his master's trade, yet upon collateral receipts, which concern not the ordinary trade of his master, he is chargeable as well as another.—3 Leon. 63.

But then he must be charged as bailiff or receiver.—2 Inst. 379, 380.

Chancery will decree an account against the administrator of an apprentice employed as a factor.—Eq. Cas. Abr. 6. p. 2.

Where there is a running account between a merchant and a broker, the proper remedy for recovering the balance is by an action of account, and not of assumpsit.—5 Taunton, 431.

The action of account will lie in every case where a person has received money to the use of another; especially if it be received from a third person, to be delivered over; although *assumpsit* may be brought.

Where personal estate is devised to A. during her widowhood, remainder over, account will lie against A. and her husband, to recover the property limited over.—2 Day's Cases, 28.

SECTION II.

Of the manner of bringing account-render, with regard to the persons against whom it is brought.

A bailiff cannot be charged as receiver; because, if he be charged as bailiff upon his account, he shall have allowance of his charges and expenses, to which he is

not entitled when he is charged as a receiver; nor is he allowed, in an action brought against him as a receiver, to plead that he was before charged as receiver.—1 Bacon's Abr. 36.

By *bailiff*, is understood a servant who has administration and charge of lands, goods, and chattels, to make the best benefit for the owner, against whom an action of account will lie for the profits which he has raised or made, after his reasonable charges and expenses are deducted.—Co. Litt. 172. a.

A *receiver*, is one who receives money, and is to render an account of it, but is not allowed any charges or expenses but what are agreed on by the parties; and in this case, the plaintiff is to declare by whose hands he received it.—ibid.

In an action of account between partners, it is sufficient in Pennsylvania, (where there is no court of chancery,) to entitle the plaintiff to judgment, *quod computet*, to prove that a partnership existed—that the defendant was the acting partner—and that he received *any part* of the sum, from *any* of the persons mentioned in the declaration: and then *all the accounts between the parties*, will come before the auditors, without particular respect to the receipts proved on the trial, or stated in the declaration. The defendant, though charged as a receiver, is entitled to every just allowance against the other; the distinction, in the general law, between bailiffs and receivers, as to their expenses, not applying in this case.—1 Dallas, 339.

As this action is founded on contract, all who are parties to the contract must join and be joined in the action; and where a woman who is liable to account marries, the action should be brought against her and her husband.—1 Vin. Abr. Account. B. pl. 4.

Where there are three partners in goods, each concerned one third in value, any one of them may bring his action of account-render against any other of them,

and any one of them may have his action for a third alone, without his companion.—Cro. Jac. 410. Rol. Rep. 421.

One of three or more partners cannot join his associates as defendants in this action, (each being interested in a different proportion of the profits;) for this would be to compel one of the defendants to account for another, and oblige him to incur a double responsibility, and become security for his co-defendant.—15 Serg. & Rawle, 153.

In order to join defendants in this action, it is necessary that they should be jointly liable, each for the whole demand; as would be the case where one firm had made another firm, consisting of several members, its bailiffs and receivers.—ibid.

SECTION III.

The nature of the demands for which account-render may be brought.

An action of account lies not for a thing certain; as if a man delivers £10 to B. to merchandise with, he shall not have account of the £10, but of the profits, which are uncertain.—1 Bacon's Abr. 36.

If a lessee of goods waste them, yet no action of account lies against him.—Rol. Abr. 116.

If the bailee of goods to bail over, waste them, or refuse to deliver them, no action of account lies, but an action of detinue, or trover and conversion.—Rol. Abr. 116. Owen, 86.

On the trial of issues certified by the auditors, the plaintiff cannot give evidence of moneys received before the time laid in the declaration.—14 Serg. & Rawle, 200.

SECTION IV.

In what cases, this is the proper action, or some other may be brought.

If A. acknowledge, by deed, that he has received £100 from B. to be adventured to the West Indies, and thence to England, back again, and covenants to render a true account thereof on his return; though B. may have a writ of *covenant* upon this deed, yet he may also have a writ of *account* thereupon, at his election.—1 Bac. Abr. 36.

The proper remedy for one partner against the other, is by action of account render. One of them cannot maintain *assumpsit* against the other, or his administrator, for the proceeds of a partnership adventure, unless they have settled their accounts, and struck a balance; and unless (it is said) there is an express promise to pay the balance.—1 Bin. 191. 4 Dallas, 434. 2 Term. R. 483. 2 Cain. 293.

It is not sufficient, to dispense with the necessity of this action, and to justify assumpsit, that the balance may be deduced from the partnership books.—9 Serg. & R. 241.

It has recently been decided, in the General Court and Court of Appeals of Maryland, that where goods are delivered to an agent to sell, who, instead of selling them, appropriates them to his own use, and refuses to account for them, *trover* may be maintained against him.—1 Har. & Johns. 579.

Where there is a promise to account, the plaintiff has his election to bring *assumpsit* or account.—Kirby's Rep. 164.

SECTION V.

What shall be a good bar to this action.

It is a good plea in bar, to an action of account, that

the plaintiff has released to the defendant all *actions*.—Rol. Abr. 123.

So, it is a good plea in bar, that the plaintiff and defendant submitted to the award of J. S. who awarded that the defendant ought to be acquitted against the plaintiff.—Cro. Car. 116. Hetl. 174.

It is no good plea in bar to the action, that the defendant has made payment of the money which he has received to account with, or that he has made satisfaction for the same.—Rol. Abr. 123, 124.

So, if the defendant pleads that the plaintiff has given him an acquittance for the sum received.—Bro. tit. Account 59. For these pleas, being matters which show that he was once accountable, are to be made use of only before the auditors.—Dyer, 22. 145. 6 Coke. Ferrer's Case.

Nonage is a good plea in bar of this action.—1 Bac. Abr. 38.

The statute of limitations may also be pleaded; but, if the plaintiff reply that it was an account between merchants, the plea will not avail him.—ibid.

A promissory note, given and received for and in discharge of an open account, is a bar to an action upon the open account, although the note be not paid.—6 Cranch, 253.

The settlement and discharge of an account for money lent and advanced, is no bar to a claim for any other demand not included in the settled account.—11 Wheat. 237.

If to a bill for an account, the defendant plead, or in his answer rely upon a settled account, the plaintiff may surcharge, by alleging and proving omissions in the account, or may falsify, by showing errors in some of the items stated in it.—ibid.

The rule is the same, in principle, at law. A settled

account is only *prima facie* evidence of its correctness: it may be impeached by proof of unfairness or mistakes in law or fact; and if it be confined to particular items of account, it concludes nothing, in relation to other items not stated in it.—ibid.

An account current, sent by a foreign merchant to a merchant in this country, and not objected to for two years, is deemed an account stated, and throws the burthen of proof upon him who received and kept it without objection.—7 Cranch, 147.

SECTION VI.

Of the auditors, and what shall be a good discharge before them.

In an action of account, there are two judgments: the first is *quod computet* (that the defendant shall account;) after which, the court appoints auditors, (usually in England, two officers of the court) who are empowered to convene the parties before them, from day to day, at any time or place that they shall appoint, till the account be determined. The time by which the account is to be settled, is previously fixed by the court; but, if the account be of a long and confused nature, the court, on application, will enlarge the time.—1 Bac. Abr. 38.

All articles of account, though incurred since the writ, shall be included, and the whole brought down to the time when the auditors make an end of their account.—2 Burr. 1086.

If either of the parties think that they have done him injustice, he may apply to the court; and if the defendant denies any article, or demurs to any demand, it is to be tried and determined in court.—1 Bac. Ab. 38.

Under the act of assembly in Pennsylvania, of 1821, the arbitrators must return an account showing the balance resulting in the sum awarded, otherwise the award is bad.—10 Serg. & Rawle, 227; 13 ibid, 112.

It is a good discharge before auditors, for a factor to say, that, in a tempest, because the ship was surcharged, the goods were cast overboard, into the sea.—Rol. Abr. 124.

So, it is a good discharge before auditors, that he was robbed of the goods, without his default or negligence.—Co. Litt. 89. Or that he had put them into a ware-house whence they were taken by an enemy.—Stra. 480.

It seems that the defendant may, in some cases, purge himself (that is, exonerate himself,) by his own oath. The statute of 4 Ann. c. 16. s. 27, gives the auditors a power, in the cases there provided for, of administering an oath and examining the parties.—1 Bacon's Abr. 39. 3 Binney, 625.

If, in account, the defendant pleads before auditors, that the goods for which he is to account, were *bona peritura;* (perishable goods, such as fruit &c.) and, notwithstanding his care in keeping them, became worse, and that they remained in his hands for want of buyers, and were in danger of growing worse, and that therefore he sold them, on credit, to a man beyond sea; this is no good plea; for a factor cannot sell even *bona peritura* on credit, without a special commission for that purpose.—1 Bac. Ab. 39.

Factors now have usually such commission.

The defendant, in an action of account, cannot pay money into court, as he may in assumpsit.—Bul. Ni. Pri. 128.

If the plea of *plene computavit* be found against the defendant, he shall account before the auditors, for the whole money with which he is charged; for this plea admits the receipt of the whole.—1 Lutw. 63.

A report of auditors, that the defendant had "fully accounted," is bad. They ought to have found that he was "nothing in arrear."—2 Day's Cases, 116.

SECTION VII.

Of the judgment, and subsequent proceedings.

In this action, as is mentioned in the preceding section, there are two judgments:—the first is, *quod computet*, (that he shall account;) and afterwards, when the account is finished, the second judgment is, that the defendant pay to the plaintiff so much as he is found in arrear. On the first judgment, a *capias ad computandum* lies; and, if a *non est inventus* be returned upon it, an *exigent* issues.—1 Bac. Abr. 40.

If the defendant make default, after the interlocutory judgment, at the day assigned by the auditors, final judgment shall be entered for the sum demanded by the plaintiff. So, if there be judgment on demurrer to an insufficient plea before the auditors.—ibid.

It seems questionable, whether, in all cases, damages are recoverable in account-render; but it is clear, that if the defendant resist the plaintiff's claim by pleading, or where an increase is received by a receiver, *ad merchandizum*, there shall be judgment for damages.—ibid.

The rule, that no one shall recover more damages than he has declared for, is not applicable to account render. The plaintiff may therefore have judgment *for the arrearages*, to a greater amount than the damages laid in his declaration.—5 Binney, 564.

Special bail is not to be found until after the judgment to account.—1 Lev. 300. Yet, in special cases, at the discretion of the court, the defendant shall find bail.—Noy, 28.

A general verdict for the plaintiff, and judgment *quod computet*, do not conclude the defendant as to the dates and sums mentioned in the declaration; but the auditors may make the proper charges, and allow the proper credits, without regard to the verdict.—2 Serg. & Rawle, 317.

CHAPTER II.

ATTACHMENT.

THE law of foreign attachment, as it exists in Pennsylvania; with a summary of the leading principles on that subject, as established by the adjudication of the respective courts in London, and the Federal Courts of the United States.

SECT. 1. Preliminary observations.

2. Acts of Assembly.

3. Who are liable to a foreign attachment, and when a domestic attachment must be pursued.

4. The courts having jurisdiction in foreign attachment.

5. For what demands, a foreign attachment will lie.

6. What description of property is liable to a foreign attachment.

7. How far the assignment of a fund will prevail against a foreign attachment.

8. Of the garnishee. How far he may retain against the plaintiff in the attachment. Of his liability to the defendant and others; and the effect of the attachment upon his estate.

9. Practice in foreign attachment.

10. Effect of a judgment, and liability of the plaintiff.

SECTION I.

Preliminary observations.

The ordinary method of proceeding in Pennsylvania, to institute a suit at common law, is by summons or

capias. But, as these necessarily suppose the presence of the debtor within the jurisdiction of the state, the process of attachment against his property is allowed in certain cases, where he is not within such jurisdiction, to prevent a defect of remedy, where there is property to answer the claim of the creditor.—Serg. on Attach. 1.

This kind of proceeding is called foreign attachment: which may be described to be a mode of proceeding by a creditor against the property of his debtor, where the debtor himself is out of the jurisdiction of the state; and is meant, in the first instance, to compel an appearance by the debtor, although eventually his property may be made liable to the amount of the plaintiff's claim.—ibid.

There is another kind of proceeding by attachment, established by the laws of Pennsylvania, called, in contradistinction to the above, a domestic attachment; which may issue against persons who are inhabitants of the state, in cases where they have been guilty of certain acts of absconding, absenting, or concealment; and is, so far as respects creditors, in the nature of a commission of bankruptcy.—ibid. 2.

The proceeding by attachment was established in Pennsylvania, as early as the year 1700, a short time after the settlement of the province. The act of 1705, however, which is the earliest legislative provision now in force on the subject of attachments, made no distinction between the two kinds,—foreign and domestic. That distinction, which now separates the two modes of proceeding, was not marked out by the legislature, until the passing of the act of 1723.

The foreign and domestic attachments, as now settled, differ in the following particulars:—

1. A domestic attachment may issue against a person who is an *inhabitant* of the state; but a foreign attachment can be issued only against a person not an inhabitant of the state.—Serg. on Attach. 5.

2. A domestic attachment cannot issue except upon oath; which is not required prior to the issuing of a foreign attachment; unless where there is inserted in the writ a clause of *capias* against the garnishee; and then an oath is necessary, for the purpose of arresting him, and holding him to bail.—ibid.

3. A domestic attachment is for the benefit of *all* the defendant's creditors; but a foreign attachment is for the benefit only of the plaintiff.—ibid. 6.

4. By a domestic attachment, all the property of the defendant is (if it be proceeded in) vested in trustees, who are to distribute it amongst the creditors. But, in a foreign attachment, only the property attached, or in the garnishee's hands, is liable.—ibid.

5. A foreign attachment is only a process to compel an appearance; and is dissolved by the defendant's entering such appearance, by putting in special bail to the suit. But a domestic attachment, if regularly issued, can be dissolved only by disproving the facts of absconding, absence, or concealment.—ibid.

The law, on the subject of domestic attachments, in Pennsylvania, is founded altogether, upon the acts of assembly, which contain comparatively full and precise directions for their regulation.—ibid. 8.

But the acts of assembly relative to foreign attachments, although they are the foundation of that mode of proceeding, are imperfect. Much of the law on the subject, and most of the forms of proceeding, are borrowed from the proceedings under the custom of London; which the legislature took for their model in framing the act of 1705; and are now sanctioned by legal adjucations and by practice.—ibid.

By the XII. section of the act of congress of 1789, it is enacted, that "any attachment of the goods or estate of the defendant by the original process, shall hold the goods or estate so attached, to answer the final judgment, in the same manner as by the laws of such

state they would have been holden to answer final judgment, had it been rendered in the court in which the suit commenced."

SECTION II.

Act of 1705.

An act about attachments.

Whereas the laws of this government have hitherto been deficient in respect of attachments, so that the effects of persons absenting, are not equally liable with those of persons dwelling upon the spot, to make restitution for debts contracted or owing within this province, to the great injury of the inhabitants thereof, and encouragement of such unworthy persons, as frequently, by absconding, make an advantage of the defect aforesaid; To prevent which inconveniency, *Be it enacted*, That,

1. Sect. I. The justices of the respective county courts within this province, shall and are hereby empowered to grant writs of attachment: which attachments so granted, shall be duly served by the respective sheriffs or coroners, as the case may require, upon the goods and chattels of such person or persons against whom the same shall be awarded, in whose hands or possession the same shall be found, returnable to the next succeeding court respectively, where the party may proceed to trial, and shall have judgment granted the third court after the effects are seized.

2. Sect. II. The person or persons whose goods or effects are so attached, shall be defendant in the attachment; and the person, in whose hands or possession the same goods or effects are attached, shall be called the garnishee, and shall be obliged to appear in court, at the return of the attachment, and answer what shall be objected against him, and abide the judgment of the court, and shall be allowed, out of the effects attached, reasonable satisfaction for his attendance.

3. And the manner of executing writs shall be by the officer's going to the house, or to the person in whose hands or possession the defendant's goods or effects are supposed to be, and then and there declaring in the presence of one or more credible persons of the neighbourhood, that he attacheth the same goods or other effects: from and after which declaration, the goods, money, or effects so attached, shall remain in the officer's power, and be by him secured, in order to answer and abide the judgment of court in that case, unless the garnishee will give security therefor.

4. And if the plaintiff in the attachment obtain a verdict, judgment, and execution, for the money and goods in the garnishee's possession, yet the defendant in the attachment, may, at any time before the money be paid, put in bail to the plaintiff's action, upon which the attachment is grounded; whereby the garnishee will and shall be immediately discharged.

5. And if an attachment shall be made for goods or effects, and the garnishee plead he had no goods or effects in his hands at the time of the attachment, or at any time after, and the plaintiff prove the contrary, the jury in such case, being satisfied that the proof is plain and full, shall find for the plaintiff, and say what goods or effects, they find in the garnishee's hands, whereupon judgment shall be entered, that appraisement may be made of the said goods or effects so found by the jury, and a precept shall be granted, requiring the sheriff to get the same appraised; and if the garnishee will not produce them, then execution shall be forthwith awarded for the value thereof, according to appraisement, to be levied upon the lands, tenements, goods, and chattels of the garnishee.

6. Sect. III. *Provided always*, That no writ of attachment shall hereafter be granted against any person or persons' effects, but such only as at the time of granting such writs are not resident or residing within this province, or are about to remove or make their escape out of the same, and shall refuse to give suffi-

cient security to the complainant for his debt or other demand, before he depart the said province.

7. IV. *Provided also*, That after judgment obtained by the plaintiff, upon any attachments against non-residents, the plaintiff shall before sale, and after execution is awarded, find security, who shall undertake for the plaintiff, that if the defendant in the attachment, shall within a year and a day next following, by himself, or attorney, come into court, and disprove or avoid the debt recovered by the plaintiff against him, or shall discharge the same with costs, that then the plaintiff shall restore to the defendant the goods or effects, or value thereof, by the plaintiff attached and condemned, or so much thereof, as shall be disproved or discharged, or else that they shall and will do it for him.

Act of 28th September, 1789.

A supplement to the several laws of this commonwealth respecting attachments.

Sect. I. Whereas the laws of this commonwealth respecting attachments, have been found defective, inasmuch as no adequate provision is therein made for obtaining and compelling a disclosure of the goods, chattels, moneys, effects, and credits of the defendant and defendants, in the custody, possession and charge, or due and owing from any garnishee or garnishees, upon whom such writs of attachment are respectively served, so that many honest creditors have been unable to recover their just debts, and the wholesome regulations of the said laws have been often defeated: For remedy whereof, *Be it enacted*,

8. Sect. II. It shall and may be lawful, to and for any and every plaintiff and plaintiffs, in any and every writ and writs of attachment, already issued, or to be issued, by and out of any court or courts within this commonwealth, after judgment hath been duly obtained against the defendant and defendants therein respectively named, to prepare and exhibit in writing, all and

singular such interrogatories, upon which the said plaintiff and plaintiffs is, are, or shall be desirous to obtain and compel the answer and answers of any and every garnishee and garnishees, in whose hands the said writ or writs of attachment hath or have been, or shall or may be respectfully laid and served, touching the goods, chattels, moneys, effects, and credits of the said defendant and defendants, in his, or their possession, custody and charge, or from him or them respectively due and owing, at the time of the service of such writ or writs of attachment, or at any other time. And the said interrogatories, so prepared and exhibited, the said plaintiff or plaintiffs shall file, or cause to be filed in the proper court, by or out of which the said writ or writs of attachment, respectively, hath or have issued, or shall or may issue.

9. Sect. III. Each and every such garnishee and garnishees respectively, to whom a copy of such interrogatories shall be delivered, is and are hereby required and enjoined to be and appear before the justices of the same court, on a day and time by them for that purpose to be named, and then and there, in writing, exhibit and file under his or their oath or oaths, affirmation, or affirmations, (which the prothonotary of the proper county is hereby authorized and required to administer) full, direct, and true answers to all and singular the interrogatories by the said plaintiff and plaintiffs respectively prepared, exhibited, and filed, in the manner herein before directed and described. And if any garnishee or garnishees shall neglect or refuse so to do, then and in every such case, it shall and may be lawful to and for the justices of the proper court, and they are hereby required to adjudge that such garnishee or garnishees, so neglecting or refusing as aforesaid, hath or have in his or their possession, custody, and charge, goods, chattels, moneys, and effects of the said defendant or defendants, in such writ or writs of attachment respectively named, or is and are indebted unto such defendant or defendants to an amount and value sufficient to pay and satisfy the debt, claim or

demand of the said plaintiff or plaintiffs, together with all legal costs and charges of suit. And the said justices of the proper court shall thereupon award and issue a writ or writs of execution against the person or persons, or against the goods and chattels, lands and tenements of such garnishee or garnishees so refusing or neglecting as aforesaid; and therein shall proceed in like manner as if such writ or writs of execution had been awarded and issued by reason of any judgment, in such court regularly pronounced and entered, in pursuance of the verdict of a jury, or by virtue of the confession of the party.

And whereas it frequently happens, that garnishees in writs of attachment, have in their hands and possession goods and chattels belonging to the defendant, which cannot be found by the officer serving such writ to be taken and secured by him, and others are indebted in large sums of money, which they refuse to pay, or in any wise to secure; for remedy whereof,

10. Sect. IV. If any plaintiff in any writ of attachment to be issued within this commonwealth, or any person for him, shall upon oath or solemn affirmation declare, that he or she verily believes that any person or persons, upon whom any writ of attachment shall be directed to be served as garnishee, hath or have any goods, chattels, or effects, belonging to the defendant or defendants, in his, her, or their hands or possession, or under his, her, or their care, or is or are indebted to the defendant or defendants in any sum of money, although the same shall not then be due; and shall also in manner aforesaid, declare that the person or persons, upon whom such writ of attachment shall be directed to be served as garnishee, is or are not an inhabitant or inhabitants of the county within which the same shall issue, or that he or she verily believes, that there is just cause to fear that such person or persons is or are about to depart and remove from the same, it shall and may be lawful for the plaintiff to cause to be inserted in the body of the writ of attachment, a clause of *capias*

against all such person and persons as aforesaid, upon whom the same shall be directed to be served as garnishee, and he, she, or they shall thereupon be held to sufficient sureties to appear at court, and to make answers, as by this act is required; and further, render his, her, or their bodies to the prison of the proper county, or to pay the condemnation money, if judgment shall pass against him, her, or them.

SECTION III.

Who are liable to a foreign attachment, and when a domestic attachment must be pursued.

If any general rule were made, as to what will render a person an *inhabitant*, within the attachment law, it would be reasonable that his residence should be so long as to give him the right of citizenship; that is, for twelve months.—1 Dall. 158.

Where one had hired a dwelling-house and store in Philadelphia, and professed an intention to remain, but, after a residence of eight or nine months, sailed to England, leaving his copartner in possession of the house, with about the same establishment of servants, &c. the court refused to dissolve a foreign attachment issued against his effects.—ibid.

One who comes hither *occasionally*, as a captain of a ship, in the course of trade, cannot be considered an *inhabitant*, so as to subject his property to a *domestic* attachment, under the act of 1723; nor does a person going from his settled habitation here, on occasional business, to any other place, cease to be an inhabitant.—1 Dall. 153.

But one who comes to reside here, introduces his family, takes a house, engages in trade, contracts debts, and after some time runs away, with a design to defraud his creditors, is the proper object of a domestic attachment.—ibid.

A person who had taken a house in the city of

Philadelphia, following the business of a merchant or storekeeper, and who, after remaining in it for eighteen months, had absconded, was held not to be the object of a *foreign* attachment.—ibid. 152.

Where one lived and traded in Philadelphia for some years, and then sailed, as supercargo, to the West Indies, carrying with him four-fifths of his property, after making an assignment of the residue for the benefit of his creditors, and there engaged in trade, and was wholly silent in his letters about his return, for nine months, although he expressed an intention, when he sailed, of returning in twelve or eighteen months; it was held, that his property was subject to a foreign attachment.—4 Yeates, 241.

An unmarried man, who took lodgings in Philadelphia, rented a store and traded there, declaring his intentions of taking up a permanent residence, but who afterwards absconded, was held to be an *inhabitant*, under the attachment laws, although he had not resided twelve months in the city.—3 Yeates, 55.

While a man remains in the state, though avowing an intention to withdraw from it, he must be considered an *inhabitant*, and therefore not an object of a foreign attachment.—1 Dall. 480.

If the debtor be actually *dwelling* in the county where the writ issues, although he may may not be an *inhabitant*, so as to become an object of a domestic attachment, his effects are not liable to a foreign attachment.—2 Browne, 31.

But the having once been an inhabitant, will not protect a man forever from a foreign attachment, where he has notoriously emigrated from the state, and settled elsewhere.—1 Dall. 480.

The effects of an American consul, residing abroad, and who was engaged in partnership with another defendant, were held not to be protected from a foreign attachment.—1 Dall. 305.

A foreign attachment may be laid upon the property of a *foreign* corporation, when such property is found in this state.—15 S. & R. 173.

In the case of a foreign corporation, the attachment can be dissolved only upon the defendant's giving bail for the payment of the debt, interest, and costs.—ibid.

Under the construction which the act of the legislature of Pennsylvania of 1705, has received in practice, a foreign attachment will lie for debts contracted in foreign countries, by persons who never did reside in Pennsylvania, and who of course could not properly be said to absent themselves.—2 W. C. C. R. 382.

The law authorizing an attachment, is a remedial law, and ought to be extended so as to remove the mischief, and to advance the remedy.—ibid.

Under the foreign attachment law of Connecticut, an absent person who is liable for damages for breach of his covenant, is an absent debtor.—4 Cranch, 421.

SECTION IV.

The courts having jurisdiction in foreign attachment.

A foreign attachment will not lie in the Circuit Court of the United States against the effects of an *inhabitant* of the United States.—2 Dall. 396.

Otherwise, where the defendant is an inhabitant of a foreign country.—2 W. C. C. R. 382.

SECTION V.

For what demands, a foreign attachment will lie.

All attachments under the custom of London are grounded upon actions of debt: under which, are included not only actions of debt for money, but detinue for a specific article, in certain cases.—Serg. on Attach. 43.

But in Pennsylvania, a foreign attachment may issue

in other actions than those of debt and detinue. For, although according to a strict and literal construction of the act of assembly, the foreign attachment is confined to cases of debt, yet, as this is not the only case within the mischief intended to be remedied by this law, the construction given to it is of a more extensively remedial nature.—ibid.

But a foreign attachment will not lie for demands which arise *ex delicto* (from a wrong done) or where special bail would not regularly be required.—2 W. C. C. R. 382. 5 S. & R. 450.

It may however, be maintained on a demand for unliquidated damages arising out of a contract.—ibid.

Where it appeared, from the affidavit, that the covenants, for the breach of which the action was brought, were made with a person styling himself the agent of the plaintiff, who executed the instrument in his own name, without reference to the plaintiff, the attachment was dissolved, because the action could not be supported in the name of the plaintiff.—3 W. C. C. R. 560.

SECTION VI.

What description of property is liable to a foreign attachment.

The act of 1705 speaks, in different parts, of "goods and chattels," "effects," "money." The act of 1789, of "goods, chattels, moneys, effects, and credits."—Serg. on Attach. 63.

So that it seems that generally all personal property may be levied on by foreign attachment.—ibid.

If there be an attachment upon a bond, the penalty shall be attached; but the court will give judgment only for the principal.—ibid. 68.

A bond from the garnishee in a foreign attachment to the debtor of the plaintiff, may be attached, although

not due; and execution may issue for the amount when it falls due.—2 Dall. 211.—1 Yeates, 255.

So, a debt in suit may be attached.—2 Dall. 277.—2 Yeates, 190.

But money paid into the hands of the prothonotary, in satisfaction of a judgment, is not the subject of a foreign attachment, at the suit of the former defendant. —1 Dall. 254.

Nor can money levied in execution by the sheriff, upon a *fieri facias*, and in his hands, be attached.—Serg. on Attach. 74.

Effects in the hands of a garnishee which have been assigned by the defendant, not being any longer the property of the *defendant*, are not subject to a foreign attachment for his debt.—Serg. on Attach. 80.

As, where there was an attachment of a debt; but, before the attachment issued, the defendant had assigned the debt due by the garnishee to J. S. in satisfaction of a precedent debt.—ibid.

So, where the effects in the hands of the garnishee, have been assigned by the defendant to the garnishee himself, to satisfy a debt due by the defendant to the garnishee out of the proceeds, the garnishee shall retain it in preference to a creditor who takes out a foreign attachment.—ibid. 81.

So, where the garnishee has a lien on the defendant's goods in his hands, a foreign attachment shall not divest his right to satisfaction out of them.—ibid. 82.

A legacy cannot be attached in the hands of an executor by foreign attachment, because it is uncertain, whether, after debts paid, the executor may have assets to discharge it. Another reason given, is, because a legacy is not demandable or suable at common law: and a third reason given, is, because it may work a wrong to creditors, who are third persons, and can have no day in court, in this suit, to interplead.—ibid. 86.

No attachment, under the custom of London, lieth of a rent.—ibid.

A foreign attachment may be laid, in Pennsylvania, on the *lands* of the defendant.—Peters' Rep. 249.

In case of foreign attachment against lands, there can be no garnishee.—Serg. on Attach. 64.

There may be an attachment of part of a debt.—ibid. 68.

A person may attach goods in his own hands belonging to the defendant; or money which he himself owes to the defendant.—ibid. 72.

An attachment will not lie against an executor as defendant, for a debt due by the testator.—Serg. on Attach. 61. Though the custom of London seems different.—Because, in this case, the property is altered; the demand in the testator's right being extinguished, and the executor being enabled to sue in his own name.—ibid. 78.

Property of a sister state, which had been brought into Pennsylvania, for the public use of the former, was held not to be liable to a foreign attachment, at the suit of an individual.—1 Dall. 77.

A debt due to one of several co-partners, may be attached in the hands of a garnishee, to answer a debt of the company.—2 Yeates, 35.

SECTION VII.

How far the assignment of a fund will prevail against a foreign attachment.

The plaintiff in a foreign attachment stands on no better footing than his debtor, as respects the property attached.—3 Binn. 294.

Therefore, a chose in action (or a claim unassignable in law) which has been equitably assigned, is not subject to the operation of a foreign attachment, as the

property of the assignor.—3 Binn. 394, 400.—1 W. C. C. R. 424.

Thus, stock of the old bank of the United States, which had been sold, *bona fide*, and the certificate delivered to the purchaser, with a power of attorney to transfer it at the bank, was held not liable to an attachment as the property of the vendor, although, at the time of the attachment, it remained in the name of the vendor on the books of the bank.—3 Binn. 394.

A., living in Charleston, remitted a bill of exchange to B. in Philadelphia, and, at a subsequent day, directed the proceeds to be applied to the payment of certain specified creditors, in certain proportions: C. one of the creditors, attached the whole fund in the hands of B., and of the drawee of the bill: *Ruled*, that, from the time of receiving A's letter, directing specific payments, B. became a trustee for those creditors, and that the creditors thereupon acquired such an interest in the trust fund, as could not be divested or affected by the plaintiff's attachment.—4 Dall. 279.

A creditor who lays an attachment upon the property of his debtor, after notice from a third person that he has an interest in the fund, is bound to refund to such third person, his proportion of the money recovered under the attachment, notwithstanding that the whole has been decreed to him by the judgment of a court of competent jurisdiction.—3 Binn. 338.

Whether, after a general assignment, made in Pennsylvania, for the benefit of creditors generally, a particular creditor residing in Pennsylvania, can lawfully lay an attachment on the goods of the debtor in another state, is doubted.—12 S. & R. 291.

Such attachment may lawfully be made by an inhabitant of Pennsylvania, on behalf of a *British* creditor of the assignor.—ibid.

Notwithstanding an assignment by commissioners of bankrupt in *England*, an *American* creditor may attach the effects of the bankrupt here.—6 Binn. 353.

SECTION VIII.

Of the garnishee. How far he may retain against the plaintiff in the attachment: of his liability to the defendant and others; and the effect of the attachment upon his estate.

The act of assembly of 1705, defines the garnishee, by saying, that "the person in whose hands or possession the goods or effects are attached, shall be called the *garnishee*."

The general rule is, that any person may be made garnishee, and compelled to plead and answer as such, in whose hands or possession it is alleged that there is property of the defendant, or the expectation thereof, and on whom the writ of attachment is regularly served as garnishee.—Serg. on Attach. 88.

Although a garnishee may be liable as endorser for the defendant in the attachment, yet unless he is actually a creditor, at the time of the attachment, the funds of the original debtor are bound, and the effect of the attachment cannot be diminished by subsequent credits to which the garnishee may become entitled.—2 W. C. C. R. 488.

Thus, if after a foreign attachment laid, the garnishee, as endorser of a bill, accepted by the debtor, and protested before the attachment laid, pays the bill, he cannot retain against the plaintiff to the amount so paid.—ibid.

If the garnishee pay over to the plaintiff, the debt attached, without being compelled to do so by due course of law, and without requiring the security directed to be given by the act of assembly, he will not be discharged from the original debt.—1 Binn. 25.

So, from the time that the attachment is served upon the garnishee, he is restrained from paying over the debt, or transferring the property, to the defendant in

the attachment: he must await the legal issue of the proceeding, to determine his conduct in that respect.—Serg. on Attach. 108.

A garnishee is not liable for interest, during the period in which the attachment was pending; unless he has been guilty of fraud, or neglect.—2 Dall. 215.—1 Yeates, 274.—11 S. & R. 190.

Where the attachment is laid in the hands of a third person, interest ceases until it is dissolved.—1 Peters' Rep. 521.

But this exemption from interest, does not extend further than the amount of the debt claimed in the attachment, with the interest which would probably accumulate, together with a liberal allowance for the costs of suit and the expenses of the garnishee: beyond this, the garnishee will be liable for interest.—13 S. & R. 224.

Where the attachment is laid by the plaintiff on credits, &c. in his own hands, interest continues to run during the pendency of the attachment.—1 Peters' Rep. 321.

The garnishee is bound by the act of congress of 2d March, 1799, to satisfy, in the first instance, all debts due to the United States, on custom-house bonds, where the debtor is insolvent.—2 S. & R. 221.

SECTION IX.

Practice in foreign attachment.

A foreign attachment may be laid upon property in the hands of the *plaintiff* in the attachment.—1 Peters' Rep. 245.

Where a shallop had been attached, the court, on motion, ordered it to be sold, as a chargeable commodity.—1 Dall. 379.

Where the money attached in the garnishee's hands is not due and payable at the time of the plea, the gar-

nishee ought to plead, that "it is true he has so much money in his hands, but that the same is not due and payable to the defendant till a certain day to come;" and then the plaintiff shall have judgment presently against the garnishee for the moneys attached; but execution shall stay.—Serg. on Attach. 94.

The court may enquire into the cause of action, in the same manner as in cases of *capias*, and will adjudge that the effects of the defendant be discharged from the attachment, if no sufficient cause of action appear.—1 Dall. 154.

In foreign attachment, the law as to affidavits of the cause of action, is the same as in England previous to the act of 12. Geo. I. therefore, an affidavit, sworn to before the lord mayor of London, was held sufficient.—1 Dall. 158.

The court does not require the same precision in affidavits of cause of action in foreign attachments, as in cases of capias.—2 Browne, 78.

Special circumstances will induce the court to grant a rule to show cause of action after the first term.—Serg. on Attach. 138.

If the property attached in the hands of the garnishee be not liable to attachment, it seems the court from which the writ issued may be applied to, to dissolve the attachment.—ibid. 100.

Goods or effects which come to the hands of the garnishee after the attachment served, are liable upon that attachment.—ibid, 101.

But, under the custom of London, the defendant's property must be found to have come to the hands of the garnishee before plea pleaded.—ibid. 103.

If the plaintiff do not prove more in the hands of the garnishee, than the latter admits by his plea to the *scire facias*, or his answer upon interrogatories, he pays costs; but if more be proved, then the costs fall upon the garnishee.—2 Dall. 43.

A share of bank-stock attached, cannot be transferred to the plaintiff, on a judgment in foreign attachment.—4 Yeates, 377.

The garnishee may put in special bail to the action in a foreign attachment in the absence of the defendant, and so dissolve the attachment, and all the proceedings thereon.—Serg. on Attach. 131.

So, a fourth person, interested as assignee of the debt owing by the garnishee to the defendant in the attachment, may put in bail to the action, without the privity or consent of the defendant.—ibid.

The death of the defendant after final judgment, does not dissolve the attachment.—4 S. & R. 557. But the death of the defendant after *interlocutory* judgment does; because there is not any party in court.—4 Dall. 60.

It is not necessary that the security given for the restoration of the goods, if the defendant should within a year and a day disprove the debt, should be given before the issuing of the execution: it is sufficient, if it be given *before sale*.—ibid.

Where the defendant dies after final judgment, the plaintiff must give the security to his representatives. —4 S. & R. 565.

The motion to dissolve an attachment has been heard when made by various persons:—As, by creditors who have issued a domestic attachment against the same defendant, on the ground of the defendant's not being the object of a foreign, but of a domestic attachment: by the garnishee (who was also a copartner with the defendant,) on the ground that the defendant was not liable to a foreign attachment: by the defendant, (through his counsel,) on the ground that the action would not lie; the court not having jurisdiction in it.—Serg. on Attach. 143.

If the garnishee be sued by the defendant in the at-

tachment, while the attachment is pending, and not proceeded into judgment and execution, it seems he may plead the foreign attachment pending in abatement. —Serg. on Attach. 145.

But he is not compelled to plead the foreign attachment pending, in abatement: for, if the suit by the defendant in the attachment against him, be suffered to proceed to verdict, he may, on application to the court, obtain an order for an indemnification by the plaintiff against such attachment pending, before he will be compelled to pay over the amount.—ibid.

It is no ground for dissolving a foreign attachment, that another foreign attachment has been laid in another district, for the same cause of action.—3 W. C. C. R. 560.

But a foreign attachment was set aside, where a judgment had been obtained, for the same demand, in a sister state, and an execution issued in pursuance thereof.—4 Yeates, 275.

If there be attachment of boxes or trunks locked (which may be) it must be so returned by the sergeant upon the action; and the court, next day after four court days passed, will grant judgment for the opening of them.—Priv. Lond. 266.—Serg. on Attach. 19.

SECTION X.

Effect of a judgment, and liability of the plaintiff.

The judgment of the court in another state in an attachment laid there, respecting the disposition of the property attached, is conclusive in every other state.—12 S. & R. 287.

But such judgment has been held not to be conclusive evidence of the *debt*, in an action between the same parties in Pennsylvania.—Serg. on Attach. 114.

An action may be maintained against the plaintiff in a foreign attachment, for attaching the property of a

debtor who is not within the purview of the attachment laws.—14 S. & R. 387.

The entering of special bail to dissolve the attachment, and confessing of judgment for a smaller amount than that claimed, are not a waiver of the right of action.—ibid.

Even though the plaintiff has prosecuted the foreign attachment so far as to judgment against the garnishee, yet if he has not taken out execution, he may stop, and resort to have judgment and execution against the defendant, his principal debtor; and the defendant may sue the garnishee for *his* debt.—Serg. on Attach. 110.

CHAPTER III.

DOMESTIC ATTACHMENT IN PENNSYLVANIA.

Adjudications.

The affidavit on which a domestic attachment is grounded, is not conclusive; and the attachment may be dissolved, on proper proof, without previous notice to creditors.—2 Yeates, 277.

A domestic attachment will be dissolved, where the debt upon which it issued was not due at the time of laying the attachment.—1 Browne, 282.

Where there was strong circumstantial evidence of a fraudulent intention in the defendant's departure, the court refused to dissolve the attachment, though the defendant had declared that he was going to collect money, had left his family behind, and had returned home before the return day of the writ.—ibid.

Under the act of 1807, three trustees must be appointed, aud must qualify before any can act; but, if they all qualify, the acts of a majority will bind.—9 S. & R. 94.

An action does not lie, by a creditor, against the trustees, until they have been called before the court which appointed them, to settle their accounts.—5 S. & R. 137.

CHAPTER IV.

Judicial decisions on the several laws of Attachment, in the states of Massachusetts, Connecticut, Vermont, New York, Maryland, Virginia, North Carolina, South Carolina, Kentucky, Tennessee.

SECTION I.

Massachusetts.

The contingent wages of a seaman on board a vessel which has not arrived at any port of unlading, are not attachable in the hands of the owner of such vessel as trustee; there being no existing debt from the owner to the seaman.— 1 Mass. 471.

Under the foreign attachment act, an aggregate corporation cannot be summoned as trustees; nor can the effects and credits in the hands of such corporators be attached.—2 Mass. 37.

Shippers of a cargo, under the agreement that the owners of the ship shall be entitled to a certain proportion of the nett profits, cannot be considered as trustees of such owners previous to the completion of the voyage.—3 Mass. 33.

A credit, to be liable to attachment, must be so situated, that, if it be taken by the attaching creditors, the trustee may legally defend himself when called upon by the principal. Therefore, a sum reported in favour of the principal, by referees to whom a pending cause has been referred, cannot be attached in the hands of the debtor; because, in the action between the principal and the debtor, no day for pleading remains, and the law furnishes him with no legal defence against the principal's demand of judgment.—3 Mass. 121.

A sheriff, having collected money upon an execution not yet returnable, and from whom the money has not been demanded, cannot be held as the trustee of the judgment debtors on a foreign attachment.—3 Mass. 289.

Where a debtor has assigned real estate to his creditor, which the creditor has afterwards sold for an amount exceeding the amount due to him, he may be held as trustee for the surplus.—3 Mass. 564.

A promise to perform labour for another, is not a chose in action attachable, until the promise is broken.—4 Mass. 102.

A judgment debtor against whom an execution may issue, is not liable to an attachment as trustee of the judgment creditor. He can, at law, make no defence against satisfying the execution.—4 Mass. 170.

But, being so attached, it seems that by disclosing the judgment as effects or credits in his hands, he may be liable as trustee.—ibid.

A contingent creditor is not attachable by the process of foreign attachment. The debt must be absolute, although the time of payment may be in future.—4 Mass. 235.

A debtor, against whom is pending an action for the recovery of the debt, cannot be held as trustee of his creditor, by reason of such debt, after issue joined in such action. The effects must be attached under such

circumstances as will enable the trustee to plead the attachment in bar of the action of the principal.—4 Mass. 238.

Where the debtor of A. has made an express promise, by order of A, to pay the debt to A's factor, such debt cannot be attached in the debtor's hands as the property of A.—4 Mass. 258.

The answer of a trustee in foreign attachment, must be received as true: and, if he answer falsely, the plaintiff may have his remedy in a special action on the case, agreeably to the ninth section of the statute of 1794. c. 65.—4 Mass. 272.

The promissor in a contract not negotiable, but which is assigned in equity, cannot, after the assignment, be held as the trustee of the promisee. But the assignee must, if he would avail himself of the assignment, exhibit to the trustee, before he is examined, satisfactory evidence of a legal assignment, made before the attachment, that the trustee may, in his answers, lay this evidence before the court.—4 Mass. 450.

If an attaching creditor, having knowledge that the debt which he attaches is assigned, believes the assignment to be fraudulent, he may sue the assignee as trustee, and compel a discovery.—4 Mass. 508.

Assignment of a book debt will protect it from attachment in the debtor's hands, though notice of the assignment be not given to the debtor until after the attachment is served.—ibid.

Where a son had, by consent of his father, and under an expectation that his father would devise the land to him, erected a house on the father's land; the father was held not liable to attachment, as a creditor of his son: for, though the father might disturb the son in possession of the house, yet it will not be presumed that he will take this advantage.—4 Mass. 514.

A stranger to a suit, in which a trustee is examined, is not concluded by the examination from proving that

there were other facts within the knowledge of the trustee, which he did not disclose, or that there was collusion between him and the plaintiff or defendant in such suit. But, when a party in a suit will produce the examination of a trustee, as evidence of his confession, he ought to be bound by it.—5 Mass. 210.

A sheriff, having received money on an execution, cannot be held as trustee of the judgment creditor, until after a demand made upon him by the creditor. The money so lying in the sheriff's hands, is not the property of the judgment creditor; and much inconvenience would result, if the execution of the judgments of the law could be thus arrested.—5 Mass. 319.

Lands fraudulently conveyed in mortgage, do not make the grantee a trustee for creditors, because as to them the conveyance is void, and the lands are liable to their executions, without the assent or exposure of the grantee; and, after their paying their value to one creditor, as trustee, another might take them in execution, and thus the grantee might be charged with the value, without any consideration.—5 Mass. 390.

An auctioneer selling goods by order of a sheriff, who had attached the goods by writ, and advertised them for sale, and received the money for them, is accountable only to the sheriff, and cannot be held as trustee of those to whom the goods belonged before the attachment. The sheriff has a special property in the goods, and the auctioneer is merely his agent to put up the goods at auction, and receive the money for him; and there is no privity between the auctioneer, and the persons whose the goods were before the attachment. —6 Mass. 166.

A public officer who has money in his hands, to satisfy a demand which one has upon him, merely as a public officer, cannot, for that cause, be adjudged his trustee. The statute extends only to cases in which goods &c. are deposited in the hands of the trustee by the debtor.—7 Mass. 259.

An executor, having assets, cannot be charged as the trustee of one to whom a pecuniary legacy is bequeathed by the will of the testator.—7 Mass. 271.

What goods are the subject of attachment, must be determined by the common law; no directions on this point being given by any statute.—7 Mass. 123.

Chattels which cannot lawfully be seized on execution, cannot lawfully be attached; and, as the right to seize chattels remains as at common law, so must the right to attach by original writ depend on the common law.—6 Mass. 242.

While goods continue *in transitu*, they are not liable to attachment as the property of the consignee.—5 Mass. 157.

If a creditor have received goods from his debtor, in pledge, as a security for the debt, he cannot lawfully cause other property to be attached for his security, without first returning the pledge.—8 Mass. 150.

Generally, goods which cannot be returned in the same plight in which they were taken, but which would be materially injured by removal, are not liable to attachment.—7 Mass. 123.

Thus, green hides in a vat are not the subject of attachment.—ibid.

Private papers and account books are not goods and chattels, which are liable to be attached, or sold on execution.—12 Mass. 506.

Partnership effects are liable to be attached by a creditor of one of the firm, and the attachment will be good against all creditors, whose demands are not upon the company.—6 Mass. 242.—11 Mass. 242.

To constitute an attachment of goods, the officer must have the actual possession and custody of them, as much as on seizure by execution.—Bigel. Dig. 95.

But it is not necessary that every article be taken

hold of by the officer: it is sufficient if he be in view of the whole, with the power of taking them into his actual possession.—ibid.

If an officer break into the dwelling house of the debtor, and attach his goods, the attachment will be good, although the officer may be punished as a trespasser.—Mass. 155.

The use by the debtor, or by his family, of such articles as will not be injured by the use, if by permission of the officer or his servants, will not vacate an attachment.—12 Mass. 495.

Goods previously attached cannot be attached on another suit, unless by a writ executed by the officer who already has the possession; for another officer, in order to attach, must lawfully take the possession; but he cannot lawfully take the goods from the officer who has first lawfully attached them.—5 Mass. 271.

But, if a sheriff attach goods, a marshal of the United States may afterwards attach the same goods, on suits in favour of the United States, and entirely defeat and render void the attachment by the sheriff; and this in consequence of the priority given by law to the United States.—5 Mass. 214.

But this priority is given only in cases of insolvency which the laws of the state recognize as such.—9 Mass. 431.

Goods attached are in the legal custody of the officer, and he is accountable for them, no less to the defendant, than to the plaintiff in the suit; and the general property in the goods is not changed, until a levy and sale by execution.—7 Mass. 505.

When an officer attaches the cattle of a debtor, the debtor is bound to support them, after notice to him, by the officer, that they are attached; and, if the debtor neglect to support them, and they thereby perish, he must suffer the loss; for they are at his risk.—9 Mass. 535.—12, ibid. 163.

Nevertheless, if an officer attach cattle, he is answerable to the creditor for them; and, if the debtor neglect to provide for their support, the sheriff is bound so to provide, by the duty which he owes to the creditor; and his apprehension of incurring expense in their maintenance, will furnish no excuse for his neglect.—ibid.

A conveyance of an insolvent debtor's property, in trust to pay the demands of a creditor, without his consent, will not defeat an attachment made before the assent; for the goods still remain the property of the debtor, and as such are liable to attachment.—5 Mass. 144, 157.

SECTION II.

Connecticut.

The original defendant in a foreign attachment to whom the garnishee is indebted, by promissory note, cannot endorse the said note to a third person after service of the attachment.—Kirby, 149.

Where a suit is commenced by attaching the property of the defendant, who afterwards commits an act of bankruptcy, and regularly obtains a certificate, and pleads the same in bar of the suit, judgment will be rendered against the defendant, but execution will issue only against the property attached.—1 Day's cases, 136.

A gave a legacy to the wife of B, payable in collateral articles, in three and six years from the testator's death; C. a creditor of B. attached this legacy in the hands of A's executor, and demanded the same from him, on execution before the first instalment became due, and then brought a *scire facias* against him, to answer the debt out of his own estate: held, that he was not liable.—3 Day's cases, 436.

Under the foreign attachment law of Connecticut, an absent person who is liable for damages for breach

of his covenant, is an absent debtor.—2 Peters' Cond. S. C. Rep. 157.

SECTION III.

Vermont.

Money collected by an officer on execution, cannot be attached in his hands.—Chipman, 66.

SECTION IV.

Maryland.

The act of 1715, c. 40, directing the manner of suing out attachments, has been construed to extend to lands, since the stat. 5 Geo. II. c. 7. making lands chattels for the payment of debts, &c.—3 Har. & M'Hen. 594.

The affidavit on which a judge of Maryland may grant a warrant for the issuing of an attachment under the act of 1795. c. 56, may be made before the judge of *any court*, of any of the United States.—4 Har. & M'Hen. 291.

An affidavit endorsed on a bond, that the obligee had received no part or parcel of the debt, but omitting to swear that the debt was *bona fide* due, is not sufficient to ground an attachment on, against an absconding debtor.—1 Har. & M'Hen. 504.

Under the act of 1795, a justice of the peace has no authority to issue his warrant to the clerk of the general court, directing him to issue an attachment.—4 Har. & M'Hen. 162.

An attachment was quashed, on the ground that creditors in England were bound by the statute of bankruptcy, and could not attach the effects of a bankrupt in Maryland.—1 Har. & M'Hen. 236.

Where three partners, residing in England, became bankrupt, having effects in Maryland, an attachment

was held to lie, by a citizen of Maryland, against the one-third of the effects, to satisfy a debt due to him by one of the partners, and contracted in England.—2 Har. & M'Hen. 463.

Where there are two attachments, the one which was first delivered to the sheriff, and first laid in the hands of the garnishee, will have the priority of right. —2 Har. & M'Hen. 261.

Where the garnishee is indebted to the defendant by a promissory note, an attachment laid on such note, in his hands, is a lien, and the note cannot afterwards be passed away.—1 Har. & J. 536.

Where there is a seizure of land under an attachment, and judgment of condemnation, the plaintiff does not gain any right of property or of entry into the lands condemned, neither is the right of property or entry divested out of the defendant, until sale.—3 Har. & M'Hen. 594.

It is not necessary for the plaintiff, on a judgment of condemnation on an attachment, to give security to the defendant, if a year and a day have elapsed since the issuing of the attachment.—2 Har. & M'Hen. 261.

An equity of redemption of real estate in Maryland, is liable to an attachment.—3 Peters' Cond. S. C. Rep. 460.

SECTION V.

Virginia.

The 12th section of chap. 123, 1 Rev. Code, allowing persons to interplead in attachments without bail, does not extend to attachments for rent.—Gilmer, 142.

A judgment on an attachment ought not to be quashed, merely because the bond given on suing it out, recited only the sum due, without mention of interest.—Gilmer, 34.

The service of a subpœna, in a case of chancery attachment in Virginia, will make the garnishee liable, if he pays away the money after the notice of the subpœna.—2 Peters' Cond. S. C. Rep. 345.

SECTION VI.

North Carolina.

A creditor who is a citizen of this state, may attach property of his debtor found here, though such debtor is a citizen of another state, and by an insolvent law of that state, his property has been assigned for the benefit of all his creditors.—2 Car. Law. Rep. 254.

Although a defendant is not about to remove, yet, if the plaintiff has made the oath, the proceeding in the attachment must go on; though the defendant may indict him for perjury.—1 Hayw. 365.

The plaintiff, in a writ of attachment, need not swear positively to the amount of his debt or damage: it is sufficient if he swear to the best of his knowledge and belief.—C. & N. 86. S. P. C. & N. 299.

On an attachment, the sheriff must take the property into his actual possession.—2 Hayw. 73.

Moneys in the hands of the sheriff, or of the clerk of a court, cannot be attached.—ibid. 171.

Money paid into the office on an execution, cannot be attached in the hands of the clerk, at the instance of a creditor of the plaintiff in the execution.—1 Murp. 47.

An administrator cannot be compelled as a garnishee to appear and answer.—2 Hayw. 334.

An original attachment is used only to compel an appearance, and where sureties are given, they are like bail, and may surrender.—1 Hayw. 21.

A party may interplead to an attachment, at any time before final judgment; and to enable him to do

so, it was regular to set aside a default which had been entered up for two terms.—1 Car. Law Rep. 236.

SECTION VII.

South Carolina.

Attachments may issue out of the admiralty courts of the United States, against the effects of an absent debtor, so as to make him a party to the suit.—Bee, 186.

The first writ of attachment lodged in a sheriff's office, has the first lien on the goods of an absent debtor, though a second writ of attachment be first served on the garnishee.—2 Bay, 8.

An attachment creates a lien, which nothing subsequent can destroy, unless the dissolution of the attachment on the conditions mentioned in the act.—1 M'Cord. 480.

An attachment laid in South Carolina on the effects there of a person declared bankrupt in England, is entitled to a preference over the claim of the English assignees, although the commission and assignment were prior in time to the attachment.—1 Rep. Con. Ct. 283.

A sheriff has no right under the attachment law, to take a vessel and cargo out of the possession of a consignee who has a lien in the first place for his demands as a creditor in possession.—2 Bay, 224.

Where a defendant is actually without the state, an attachment cannot be issued by a justice of the peace. —1 Nott & M'C. 205.

Under the act of South Carolina, a magistrate has no right to issue an attachment against the goods of a person actually out of the state, but only against the goods of those who are in the act of moving, or who conceal themselves.—1 Bay, 361.

Where an act of asembly required a garnishee in an

attachment to make oath to a return, it was held that a corporation garnishee, might make the return under the signature of the head of the corporation, and the official seal.—2 Bay, 10.

A garnishee in an attachment is entitled to the same defence against the plaintiff, as he might have had legally against the absent debtor, if he were present, and suing to recover the supposed debt.—2 Rep. Con. Ct. 456.

The garnishee in an attachment has no right to question the regularity of the proceedings against the absent debtor.—1 M'Cord, 116.

SECTION VIII.

Kentucky.

The attachment must run in the name of the commonwealth, otherwise the proceedings will be reversed. —Hard, 94.

An attachment will not lie on a complaint that the defendant "hath absconded:" the allegation under the act must be in the *present* tense.—1 Marsh. 354.

So, a suggestion, that the defendant "had either left the county and commonwealth, or so absconded himself, that the ordinary process of law cannot be served upon him," is insufficient to support an attachment.—Hard. 342.

SECTION IX.

Tennessee.

No judgment can be entered against a garnishee, until a judgment is recovered against the defendant.—Cooke, 478.

Justices of the peace have no authority to summon a garnishee.—ibid.

An attachment is the same process in equity, as at

law, and will not lie where the defendant can be arrested on ordinary process.—3 Hayw. 203.

To authorize an original attachment, one of the parties must be an inhabitant of the state.—Cooke's Rep. 49.

Money levied by a sheriff, by virtue of an execution, cannot be attached in his hands.—1 Tenn. Rep. 208.

CHAPTER V.

BAILMENT.

SECT. 1. Definitions and general rules.

2. Of simple bailment, by which the bailee has only the bare possession.

3. Of pledging goods, as a security for money.

4. Of bailment which vests a special property, and therein of lending on special contracts.

5. Where the thing bailed is destroyed, or deteriorated, to whom is the loss, and to whom is the remedy.

SECTION I.

Definitions and general rules.

BAILMENT is a delivery of goods on a condition, expressed or implied, that they shall be restored by the bailee to the bailor, or according to his directions, as soon as the purpose for which they were bailed shall be answered.—Jones on Bailm. 5.

From the obligation contained in the definition of

bailment, "to restore a thing bailed at a certain time," it follows that the bailee must *keep* it, and be *responsible* to the bailor, "if it be lost or damaged:" but, as the bounds of justice would, in most cases, be transgressed, if he were made answerable for the loss of it *without his fault*, he can be obliged to keep it only with a degree of care, "proportioned to the nature of the bailment;" and the investigation of this *degree* in every contract, is the problem, which involves the principal difficulty. —ibid.

There are infinite shades of *care* or *diligence*, from the slightest momentary thought, or transient glances of attention, to the most vigilant anxiety and solicitude; but *extremes* in this case, as in most others, are inapplicable to practice. The first extreme would seldom enable the bailee to perform the condition, and the second ought not, in justice, to be demanded; since it would be harsh and absurd to exact the same anxious care, which the greatest miser takes of his treasure, from every man who borrows a book or a seal. The degrees, then, of care, for which we are seeking, must lie somewhere between these two extremes; and by observing the different manners and characters of men, we may find a certain standard, which will greatly facilitate our inquiry; for, although some are excessively careless, and others are excessively vigilant, and, some through life, others only at particular times, yet we may perceive, that *the generality of rational men* use nearly the same degree of vigilance in the conduct of *their own* affairs; and this care, therefore, which *every person of common prudence, and capable of governing a family* takes of *his own* concerns, is a proper measure of that which would uniformly be required in performing every contract, if there were not strong reasons for *exacting*, in some of them, a *greater*, and permitting in others a *less* degree of attention.—ibid. 5, 6.

If the construction be *favourable*, a degree of care *less* than the standard will be sufficient; if *rigorous*, a degree *more* will be required; and, in the first case, the

measure will be that care which *every man of common sense, though absent and inattentive*, applies to his own affairs; in the second, the measure will be that attention which a man *remarkably exact and thoughtful*, gives to the securing of his personal property.—ibid 7.

The fixed mode or standard of *diligence*, I shall (for want of an apter epithet,) invariably call ORDINARY. The degrees on each side of the standard, being indeterminate, need not be distinguished by any precise denomination: the first may be called *less*, and the second *more*, than ordinary.—ibid.

The constant or fixed mode of *default*, I likewise call *Ordinary;* not meaning by that epithet to diminish its culpability, but wanting a more apposite word, and intending to use this word uniformly in the same sense. Of the two variable modes, the first may be called *greater* and the second *less* than ordinary; or the first *gross*, and the other *slight* neglect.—ibid. 9.

When the contract is reciprocally *beneficial to both parties*, the obligation hangs in an even balance; and there can be no reason to recede from the standard. Nothing more, therefore, ought, in that case, to be required, than *ordinary diligence*, and the bailee should be responsible for no more than *ordinary neglect:* but it is very different, both in reason and policy, when *one* only of the contracting parties derives advantage from the contract.—ibid. 10, 11.

If the *bailor only* receive benefit or convenience from the bailment, it would be hard and unjust to require any particular trouble from the *bailee*, who ought not to be molested unnecessarily for his obliging conduct: if more, therefore, than *good faith* were exacted from such a person; that is, if he were to be made answerable for less than *gross* neglect; few men, after one or two examples, would accept goods on such terms, and social comfort would be proportionably impaired.—ibid. 11.

On the other hand, when the *bailee alone* is benefited

or accommodated by his contract, it is not only reasonable, that he *who receives the benefit should bear the burthen*, but if he were not obliged to be *more than ordinarily careful*, and bound to answer even for *slight* neglect, few men (for acts of pure generosity and friendship are not here to be supposed) would part with their goods for the mere advantage of another, and much convenience would consequently be lost in civil society.—ibid. 11.

This distinction is conformable not only to natural reason, but also, by a fair presumption, *to the intention of the parties*, which constitutes the general law of all contracts, when it contravenes no maxims of morals or good government; but, when a different intention is *expressed*, the rule yields to it, and a bailee without benefit may, by a special undertaking, make himself liable for *ordinary* or *slight* neglect, or even for inevitable *accident*.—ibid. 11, 12.

It is a just rule, that *every* bailee is responsible for *fraud*, and even though the *contrary* be stipulated, but that *no* bailee is responsible for accident, unless it be *most expressly agreed*.—ibid. 12.

SECTION II.

Of simple bailment, by which the bailee has only the bare possession.

If A. leave a chest locked up with B., to be kept, and take away the key, the goods in the chest are in the possession of A; for, since A keeps the key, the goods are locked out of the possession of B; and B. cannot be supposed to have them under his custody; so that neither the possession nor the use of the goods are in B; for, though the possession of the box is in B., yet is he shut out from the possession of the goods in the box; for, that cannot be said to be in his possession, which he cannot take hold of and remove, or order, during the continuance of such possession.—1 Bac. Abr. 368.

If B. open the chest, and take the goods to a broker's and borrow money upon them, and deposit them with the broker as a security for the money so borrowed, A. may maintain trover for them against the broker, without tendering him the money for which they were pledged by B.—ibid.

If the goods of A are bailed by B to C, C must deliver them to B; for C cannot pretend to remove or alter that possession committed to him, in order to restore it to the right owner; for the right of restitution must be demanded of him that did the injury, of which C. has no pretence to judge; and therefore it would be downright treachery in him to deliver them to any other than him from whom he had it.—Roll. Abr. 607.

If a man put a chattel into the hands of a mechanic, for the purpose of repair, and the mechanic pledge it, the owner may obtain trover against the pawn-broker, without previously tendering the sum for which it was pledged.—1 Browne, 43.

If a wagoner, by whom goods are sent to be delivered to A, sell them openly in the street of a city in Pennsylvania to B., the sale vests no property in B.—8 Serg. & R. 500.

Where A. agreed with B., a common carrier, for the carriage of goods, and B., without the direction of A, agreed for the carriage with C, who, without the knowledge or direction of A. agreed with D. a third carrier, it was held that A. might maintain an action against D, for not delivering the goods, and, that by bringing the action, he affirmed the contract made with him by C. and could not afterwards recover from B.—6 Binney, 129.—6 Serg. & R. 439.

SECTION III.

Of pledging goods as a security for money.

Pledging is where goods and chattels are delivered as security for money lent, and by such pledging the

pawn-broker has more than the naked possession in the nature of bailment, for he has the property and interest in the thing itself.

If a man pledge goods to B. and he be *robbed* of them, B. shall not answer for them, because he has a property in them; and his custody is only a consequence of that property, and therefore he undertakes to keep them as his own; but if the goods be taken *clandestinely*, he shall be answerable.—1 Bac. Abr. 369.

But if a man pledge goods, and afterwards tender the money borrowed to the pawnbroker, and he refuse, this determines the qualified property; and therefore, if, after such tender the goods are robbed, the bailor shall have satisfaction made to him in an action of *trover;* for a tender and refusal must, in those cases, amount to a payment, because otherwise no man could again come to his own, since pawns are over the value lent.—ibid.

Though the borrower tender the money, and recover the goods in an action of *trover*, yet the pawn-broker may have an action of debt for his money; because, though the security ceases, yet the duty remains, inasmuch as the money lent is not paid back to the party from whom it came.—ibid. 370.

But, where a tender has been made, the pawnee should demand his money before he brings his action. —ibid.

A. pawns goods to B. for £25, and B. delivers them over to C. and makes D. his executor, and dies; A. shall tender the £25 to the executor, and not to C. for C. is no more than a bailee, and has only the custody of them, but the property of them is in D. as representative of B., and therefore to him must the tender be made; otherwise it is in the case of mortgage, where the tender may be to the assignee, because the property of the land is in him.—Cro. Jac. 244.—Yelv. 178, 179.

If a man give perishable goods as a pledge, and they decay, yet the person to whom they are pledged may have an action of *debt* for his money, because the duty continues.—Yelv. 179. Co. Litt. 209.

These goods thus taken to pledge, cannot be forfeited by the pawn-broker for his offence, nor can they be taken in execution, nor attached for his debt, for the absolute property is in another; and therefore they are not alienable, nor by consequence forfeitable, because they cannot be forfeited without loss or damage to the absolute owner; and all qualified possessors take the thing under a restriction to preserve it for the right owner.—1 Bac. Abr. 370.

But such goods may be distrained for rent.

If a man pledge goods, and afterwards is attainted of felony, the king shall not have the goods, without paying the sum for which they were pledged; for the alteration of the general property does not alter the special property in the pawn-broker.—Bulst. 29.

If the money be not paid at the day, the property is absolute at *law*, but still the right owner has his redemption in *equity*, as in case of a mortgage.

One pawned jewels to A, who signed a writing that they were to be redeemed in twelve months, otherwise that for the £100 lent, they were to be as bought and sold; A., within a short time afterwards delivers over the jewels, together with some plate of his own to B., as a pledge for £200; afterwards A. borrowed £38 and £50 from B. on promissory notes, to be repaid on demand. B. by his answer in chancery, insisted it was agreed that the pledge should be a security, as well for the money on the notes, as for the money first lent, but could make no proof of any such promise or agreement; and, though a redemption was decreed, yet it was on payment of all that was due to B., as well upon the notes as upon the pawns; but the goods of A. which were pawned were to be first applied, as far as the value of them would extend.

The pawning of any goods wrongfully purloined, taken, robbed, or stolen from any person, does not alter the property thereof, and the owner need not tender the money which has been lent upon them.

But if a man obtain goods from another under *fraudulent pretences*, and pawn them, and the owner afterwards prosecute the pawnee to conviction, and recover the possession of his goods, yet the pawnee may maintain trover for them against the owner.—5 Term. Rep. 175.

Where no day is fixed for the redemption of a pledge, the absolute property in such pledge may become vested in the pawnee, by his calling on the pawnor, and the pawnor's refusal to redeem; but, if the pawnor be not called upon, he may redeem the pledge at any time during his life, and the right of redemption will survive to the personal representatives of the pawnor against the pawnee and his representatives. If, therefore, the pawnee sell the pledge before application to redeem, he is answerable for the value of the pledge at the time of the application; and in such case, it is not necessary for the pawnor to tender the sum borrowed in order to entitle himself to an action.—2 Caines' Cas. in Error. 200.

Where a debtor left with his creditor, as collateral security, the promissory note of a third person for 600 dollars, and the creditor afterwards compromised with the drawer of the note for 300 dollars,—it was held, that the note thus deposited was to be considered and treated as a pledge, of which the general ownership remained with the debtor, who deposited the same; and that the creditor, having only a special property therein, had clearly exceeded his authority in disposing of it as he had done; that the authority of the creditor as to the note, could extend no further than to receiving the money due upon it, without first calling upon the debtor, in some way, to redeem; and that if the notice to redeem could not have been given personally to the debtor, the disposition of the pledge

should have been authorized and sanctioned by judicial proceedings; that the money, when received would be a substitute for the note, and to be held on the same terms, and subject to the same rights and duties, and, that if the creditor undertook to compromise with the drawer of the note, and received a less sum than was due, he did it at his peril, as he acted without authority; and that therefore the debtor might maintain an action against the creditor, for the difference between the amount of the note and the balance of his account with the creditor.—12 John's Rep. 146.

SECTION IV.

Of bailment which vests a special property; and herein, of lending on special contracts.

If A. put his beasts into B's pasture, on agreement to pay B. 6d. per week for the pasturage, B. cannot retain the beasts of A. until he has paid him the money, unless this were at first provided by their agreement; but the only remedy that B. has, is upon the contract. —Cro Car. 271.—2 Roll. Abr. 92.

Because the law did not oblige B. to take the cattle into pasture (as in the case of a licensed innkeeper;) consequently, B. gave credit to the *person* of the owner.

But if a horse be committed to an hostler, he may detain him, till he is paid for his meat. Because he was obliged by law to take in the horse, if he had room.—1 Bac. Abr. 373.

So, if cloth be committed to a tailor, to make up into a garment, he shall detain the cloth until he is satisfied for his labour.—ibid.

A tailor has cloth delivered to him to make up into a garment, which he does accordingly; he shall have an action for his work, without delivering the garment; and, if the tailor refuse to deliver the garment upon request, it ought to be shown on the other side, in excuse of the action; for the tailor's action is founded

upon the promise; and, if he has done the work, and is ready to deliver the garment, he has performed all that the law requires on his part, and on that consideration, is entitled to the benefit of the defendant's promise.—Palm. 223, 224.

If I sell you a horse for £20, I shall retain him, unless the money be actually paid, or conditioned to be paid at a future day; for, unless there be a *quid pro quo*, the property is not altered.—5 E. 4. 2.

The pawnee of goods may recover their full value in trespass against a stranger who takes them away, although they were pledged to him for less, being answerable to the pawnor for the excess.—5 Binn. 547.

SECTION V.

When the thing bailed is destroyed, deteriorated, or lost, to whom is the loss, and to whom is the remedy.

If goods are delivered "to be kept safely," the bailee is responsible, though he be robbed of them, for he must take his remedy against the thief or the hundred, as he can. But if they are delivered to him, "to take care of them as of his own goods," he is not responsible, if robbed.—Willes, 118.

If a friend deliver any thing to his friend *to keep for him*, the receiver is bound to restore it on demand; but such general bailment will not charge the bailee with any loss, unless it happens by gross neglect, which is an evidence of fraud: but if he undertakes specially to keep the goods safely and securely, he is bound to take the same care of them, as a prudent man would take of his own.—2 Bl. Com. 452.

A friendly depository is answerable only for *gross* neglect; and not even for that, if his character is known to the depositor; and he takes no better care of his own goods, and they also are at the same time spoiled or destroyed.—Jones on Bail. 120.

Gross negligence is to be considered with reference to the nature of the property delivered to the bailee: if money be delivered, it is to be kept with more care than common articles of property.—3 Mason, 132.

A slave being delivered to a person to be kept on trial, was permitted, in the evening, to go to a village at a short distance, and ran off. This was held not to be such a neglect as made the bailee responsible.—3 John's Rep. 170.

Where the owner of certain slaves, and also part owner of a vessel, hired the slaves to the master of the vessel, to proceed as mariners on board, on a voyage at the usual wages, and without any special contract of hiring; *held*, that the master, having acted with good faith, was not responsible for the escape of the slaves in a foreign country, which was one of the *termini* of the voyage, and consequently within the hazard to which the owner knew he might be exposed, although the going to such port was only contingent, and it might be doubtful whether the master had strictly pursued his orders in going thither.—2 Wheat. 100.

If a carrier, ferryman, or hostler, be robbed, he shall answer the value of the goods; for the carrier, &c. hath his hire, which implies an undertaking for their safe custody and delivery; and no man would give another money for securing his property, if the party that received it were not to undertake on his part to secure it.—4 Co. 84. Co. Litt. 89.

If A. delivers goods to B. to be delivered over to C., C. hath the property, and also the action against B., for B. undertakes for the safe delivery to C., and hath no property or interest, but for that purpose.—Roll. Abr. 606.

But if the bailment were not on a valuable consideration, the delivery is countermandable; and in that case, if A. the bailor, bring trover, he reduces the property again in himself, for the action amounts to a counter-

mand of the gift; but, if the delivery were on a valuable consideration, then A. cannot have trover, because the property is altered, and in trover the property must be proved in the plaintiff.—Bulst. 68. Leon 30. Yelv. 164.

If a man deliver goods to another, the bailee shall have a general action of trespass against a stranger, because he is answerable over to the bailor; for a man ought not to be charged with an injury to another, without being able to resort to the original cause of that injury, and in amends there to do himself right.—13 Co. 69. 21. H. 7. 14. b.

In an action against a voluntary bailee, for the loss of goods intrusted to his care, evidence is admissible of his concomitant acts and declarations immediately before and after the loss to disprove the allegation of carelessness and negligence.—14 Serg. & R. 275.

If a horse or other goods be delivered to an innkeeper or his servants, he is bound to keep them safely, and restore them when his guest leaves the house.—Cro. El. 622.

If a pawnbroker receive plate or jewels as a pledge, or security, for the repayment of money lent thereon at a day certain, he has them upon an express contract or condition to restore them, if the pledger performs his part by redeeming them in due time.—Cro. Jac. 245. Yelv. 178.

Where wheat is delivered at a mill to be ground, upon an agreement that the miller shall return to the farmer a certain quantity of flour for a certain number of bushels of wheat, the miller is a *bailee*, not a purchaser; and therefore, if the wheat be consumed by accidental fire, the miller will not be responsible; and this, although it is agreed that the miller is not to return flour made from that identical wheat, but from the general mass of flour.—1 Rund. 3.

If a man lend or let another his horse, and for want

of safe keeping the horse die, the owner is entitled to an action on the case: so, if a man lend another sheep to tath his land, and by the negligence of the borrower they are drowned, an action on the case lies: so, if a man lend another a horse, and he put him into a stable that is ruinous, and the stable tumble in upon the horse, and kill him, an action on the case lies; but if the stable had been strong and substantial, and had fallen by violent tempest, then is the borrower excused: so, if a man lend another a horse, and he die of divers diseases, the borrower is excused.—1 Bac. Abr. 376.

The reason of these several cases is this, that when any man borrows or hires any thing, and uses it only according to the purposes of the loan, that contract bears him out from all accidents that are consequent upon such usage; for there is no reason why the borrower should not have the use of it according as the owner had licensed and empowered him; and, if any unavoidable accident happen upon such a license, the lender must impute it to the folly of his own permission; but, if it happen through the negligence of the borrower, then it is fit he should answer for it.—ibid.

A carrier is bound to the safe delivery of a box, though he does not know what is in the box, except he refuse to carry it, unless he be instructed in the particulars; for the party is not obliged to tell him.—Allen 93. See title CARRIERS.

A voluntary bailee without reward, is liable only for *gross negligence*, for the omission of that care which the most inattentive take.—14 Serg. & R. 275.

Where A. who had received money, to be applied to the purchase of articles for B., appropriated the money to his own use, and afterwards, when about to purchase the articles for B., with other money, was robbed, it was held that he was liable to B. for the amount.—2 Nott & M'C. 489.

If A. take a horse to pasture, and the horse be stolen,

no action lies against A., unless he had made a special *assumpsit* to deliver him; for the undertaking of A. is to feed the horse in the fields and in the open air, and not to keep him safely as the hostler is obliged to do in his stable; and the law will not stretch men's promises beyond their first undertaking.—1 Bac. Abr. 376.

But if a man to whom horses are bailed for agistment, leave open the gates of his field, in consequence of which neglect, they stray and are stolen, the owner has an action against him.—ibid.

CHAPTER VI.

BILLS OF EXCHANGE.

SECT. 1. The general nature, utility, and history of bills of exchange, &c.

2. Of the parties to a bill of exchange, &c. and herein, of procuration, and the liability of partners.

3. Of the form and requisites of bills &c.

4. Want of consideration, when material.

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6. How bills &c. are construed, and effect given to them.

7. Delivery of a bill to the payee, and the effect thereof.

8. Effect of the alteration of a bill, &c.

9. Liability of the drawer.

10. Liability of the drawee.

11. Of the endorsement and transfer of bills, &c.

12. Liability of the endorser.

13. Consequences of the loss of a bill &c., and what conduct the holder should, in that case, pursue.

14. Of presentment for acceptance.

15. What constitutes a valid acceptance.

16. Of non-acceptance; and the conduct which the holder must thereupon pursue.

17. Of protest for better security.

18. Of acceptance supra protest.

19. Of presentment of a bill &c. for payment.

20. The day on which a bill &c. should be presented for payment; and herein, of days of grace, &c.

21. When checks, bills, &c. payable on demand should be presented for payment.

22. Time of the day when presentment should be made.

23. How payment is to be made.

24. Of the effect of giving time to the acceptor, &c. of compounding with them; and receiving a dividend under a commission of bankruptcy, &c.

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27. The conduct which the holder must pursue on non-payment.

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SECTION I.

The general nature, utility, and history of bills of exchange, &c.

A BILL OF EXCHANGE is defined, by Sir William Blackstone, to be an open letter of request, from one

person to another, desiring him to pay, on his account, a sum of money, therein mentioned, to a third person. —2 Bla. Com. 466.

The person who makes or draws the bill, is termed the drawer: he to whom it is addressed, is, before acceptance, called the drawee; and afterwards, the acceptor. The person in whose favour it is drawn, is termed the payee, and when he endorses the bill, the endorser; and the person to whom he transfers it, is called the endorsee, or holder.—ibid 467.

The various advantages which commerce derives from the use of bills of exchange, have induced our courts of justice to allow them certain peculiar privileges, in order to give full effect to their utility. These are, *first* that although a bill of exchange is a *chose in action*, yet it may be *assigned*, so as to vest the legal as well as the equitable interest, in the endorsee or assignee, and to entitle him to sue thereon in his own name: and, *secondly*, that although a bill of exchange, &c. is not a specialty, but merely a simple contract, yet a sufficient consideration is implied from the nature of the instrument, and is rarely essential to its validity.—2 Bos. & Pul. 79.

The first of these privileges is of essential importance, in various points of view; and principally, because a release by the drawer to the acceptor, or a set-off or cross demand due from the former to the latter, cannot affect the right of action of the payee or endorsee; because the legal, not the mere equitable interest is vested in such payee or endorsee, and the action is sustainable in his own name; whereas, suits upon bonds, and most other choses in action, must be in the name of the original obligee*; and though it be apparent that he sues merely as a trustee for another to

* By an act of assembly of Pennsylvania, 28th May, 1715, bonds and other specialties, may be assigned, and sued in the name of the assignee.

whom he has assigned his interest, yet a release from him, or a set-off due by him to the obligor, may be an effectual bar to the action.—7 Term. Rep. 663.

The second of these privileges is also of great importance. In general, an action cannot be supported upon a contract not under seal, without alleging, in pleading, and proving, on the trial, that the contract was made on a sufficient consideration; but, in the case of bills of exchange, promissory notes, &c. a sufficient consideration is always presumed, and the validity of the bill, &c. cannot in general be disputed on account of the want of sufficient consideration, when it is in the hands of a third person who has given value for it.—ibid.

The first peculiar privilege of a bill of exchange is its assignable quality, which is in direct opposition to a very ancient rule of law, the founders of which refused to sanction or give effect to the transfer of any possibility, right, or any other chose in action (which is defined to be a right not reduced into possession,) to a stranger; on the ground, that such alienations tended to increase litigation, and afforded means, to powerful men, to purchase rights of action, and thereby enable them to oppress indigent debtors, whose original creditors would not perhaps have sued them.—Co. Lit. 214. 265. a. n. l. 232. b. n. l.

Even at the earliest period of our history, the doctrine relating to the assignment of choses in action, was found to be too great a clog on commercial intercourse; an exception was therefore soon allowed, in favour of mercantile transactions. It was the observation of the learned and elegant commentator on the English laws, that, in the infancy of trade, when the bulk of national wealth consisted of real property, the courts did not often condescend to regulate personalty; but, as the advantages arising from commerce were gradually felt, they were anxious to encourage it, by removing the restrictions by which the transfer of interests in it was bound. On this ground, the custom of merchants, whereby a foreign bill of exchange is assignable by the

payee to a third person so as to vest in him the legal as well as the equitable interest therein, was recognised and supported by the English courts of justice in the fourteenth century. In short, our courts, anxiously attending to the interests of the community, have, in favour of commerce, adopted a less technical mode of considering personalty, than realty; and, in support of commercial transactions, have established the law-merchant, which is a system founded on the rules of equity, and governed in all its parts, by plain justice and good faith.—4 Term. Rep. 342.

Bills of exchange are either foreign or inland. They are foreign, when drawn by a person residing in one country upon a person residing in another; as where a bill is drawn in Philadelphia upon a merchant residing in London; and inland, when both the drawer and the drawee reside within the same state or kingdom.

It seems extremely doubtful, at what period, or by whom, foreign bills of exchange were first invented. The elementary writers on the subject, differ. It is said, by Pothier, that there is no vestige amongst the Romans, of bills of exchange, or of any contract of exchange: for, though it appears that Cicero directed one of his friends at Rome, who had money to receive at Athens, to cause it to be paid to his son at that place, and that friend accordingly wrote to one of his debtors at Athens, and ordered him to pay a sum of money to Cicero's son, yet it is observed that this mode amounted to nothing more than a mere order, or mandate, and was not that species of pecuniary negotiation which is carried on through the medium of a bill of exchange; nor does it appear that the commerce of the Romans was carried on by means of this instrument; for we find, by one of their laws, (*de nautico fœnere*,) that a person lending money to a merchant who navigated the seas, was under the necessity of sending one of his slaves, to receive, from his debtor, the sum lent, when the debtor arrived at his destined port, which would certainly have been unnecessary, if commerce, through

the medium of bills of exchange, had been in use with them. Most of our modern writers have asserted, (probably on the authority of Monstesquieu,) that these instruments were invented and brought into general use by the Jews and Lombards, when banished for their usury, in order, with the secresy necessary to prevent confiscation, to draw their effects out of France and England, to those countries in which they had chosen, or been compelled to reside: but Sir William Blackstone says (2 Bla. Com. 467,) that this opinion is erroneous, because the Jews were banished out of Guienne in the year 1287, and out of England in the year 1290; and in the year 1236, the use of paper credit was introduced into the Mogul empire and China.—4 Mod. Un. Hist. 499. Other authors have attributed the invention to the Florentines, when, being driven out of their country by the faction of the Ghibellines, they established themselves at Lyons and other towns.—Poth. pl. 7. There is no certainty, however, on the subject; though it seems clear that foreign bills were in use in the fourteenth century, as appears from a Venetian law of that period; and an inference drawn from the statute of 5 Rich. 2 st. 1, 2, warrants the conclusion, that foreign bills were introduced into England previous to the year 1381.

A bill of exchange is a simple contract, and consequently is within the statute of limitations; and must be sued for within six years after it becomes payable. —Carth. 3.

It is to be considered as a simple contract debt in a course of administration, which an executor, or administrator cannot discharge before debts by bond, without being guilty of a devastavit.—1 Selw. N. P. 224.

Inland bills of exchange, according to Lord C. J. Holt's opinion, did not originate at a much earlier period than the reign of Charles II. They were, at first, like foreign bills, more restricted in their operation than they are at present, for it was deemed essential to their validity that a special custom for the draw-

ing and accepting of them should exist between the towns in which the drawer and acceptor lived; or, if they lived in the same town, that such a custom should exist therein.—Chitty on Bills 21. At first, also, effect was given to the custom, only when the parties were merchants; though afterwards extended, as in the case of foreign bills, to all persons, whether traders or not. —ibid. Even after the general custom had been established, and it had been adjudged that all persons having capacity to contract, might make them, a distinction was taken with respect to form, between bills made payable to order, and bills made payable to bearer; for it was once thought, that no action could be maintained on a bill payable to the *order* of a certain person, by that person himself, on the ground that he had only an authority to endorse; and those payable to *bearer* were at first thought not to be negotiable, in any case. These distinctions, however, have long been held to be without foundation; and on the whole, as observed by Mr. Justice Blackstone, 2 Bla. Com. 467, although formerly foreign bills of exchange were more favourably regarded, in the eye of the law, than inland, as being thought of more public concern in the advancement of trade and commerce, yet now, by various judicial decisions, and by two statutes, the 9th and 10th W. 3. c. 17, and the 3d and 4th Anne, c. 9, inland bills stand nearly on the same footing as foreign; and what was the law and custom of merchants with regard to the one, and taken notice of as such, is now by these statutes, enacted, with regard to the other.

A PROMISSORY NOTE is defined to be a direct engagement, in writing, to pay a sum specified at a time therein limited, or on demand, to a person therein named, or his order, or to the bearer.—2 Bla. Com. 467.

The validity of such instruments, though favoured by many judges, met with a strenuous opponent in Lord Holt, who, as it has been observed, most pertinaciously adhered to his opinion, that no action could be

maintained on a promissory note, as an instrument, but that it was only to be considered as evidence of a debt. He was of opinion, that actions upon notes, as such, were innovations upon the rules of the common law; and that the declarations upon them amounted to the setting up of a new sort of specialty, unknown in Westminster Hall.—2 Lord Raym. 758, 1430. 2 East, 359. 1 Vesey, 346. The learned judge appears to have retained this opinion in a case where judgment for the plaintiff, in an action on a promissory note, was reversed, on the ground that the custom alleged in the declaration was void, since it tended to bind a man to pay money without any consideration. As observed by Lord Kenyon, C. J. this question exercised the judgments of the most able lawyers of the last century; but the authority and weight which Lord Holt's opinion had in Westminster Hall, made others yield to him; and it was thought necessary to resort to the legislature: the 3d and 4th Anne, c. 9, (made perpetual by 7 Anne c. 25. s. 3,) was therefore passed, which placed promissory notes on the same footing as bills of exchange, and consequently the decisions and rules relating to the one, are, in general, applicable to the other.

In Heylin v. Adamson (Burr. 676,) Lord Mansfield declared, that though, while a promissory note continues in its original shape of a promise from one man to pay to another, it bears no similitude to a bill of exchange, yet, that when it is endorsed, the resemblance begins: for then it is an order by the endorser upon the maker of the note, to pay to the endorsee; the endorser becomes, as it were, the drawer; the maker of the note, the acceptor; and the endorsee, the payee. This point of resemblance being once fixed, the law relative to bills becomes applicable to promissory notes.

Checks, or drafts on bankers, appear to have been sanctioned and recognised as valid instruments by the courts, previously to the statute of Anne. In point of form, they nearly resemble bills of exchange, and

differ from them in this respect, that they are mostly made payable to bearer; and should be drawn upon regular bankers.

It was once thought that these instruments were not generally negotiable, but were so merely within the bills of mortality, (in London.) Burr. 1517; but it is now settled, that they are as negotiable as bills of exchange, though, strictly speaking, they are not due before payment is demanded; in which respect, they differ from bills of exchange, or promissory notes made payable at a particular day: (7 Term Rep. 423.) they are usually considered as cash, when given in payment; and are sometimes declared on as bills of exchange.—ibid.

SECTION II.

Of the parties to a bill of exchange, &c. and herein of procuration, and the liability of partners.

It is essential to the validity of every contract, that there be proper parties to it, and that those parties have capacity to contract. The parties to a contract are generally only two; namely, the person binding himself to perform some act, and the person in whose favour that act is to be performed: but, in the case of bills of exchange, &c. on account of their assignable quality, there may be, and usually are, more than two parties.

With respect to the competency of the contracting parties in general, the law has wisely protected the interests of those who either have not judgment to contract, as in the case of infants; or who, having judgment to contract, cannot, in law, have a fund or property to enable them to perform the contract, as in the case of a feme covert; and therefore it has, in general, rendered the contracts of infants voidable, and those of married women absolutely void.

Infants may contract for necessaries; Burr. 1801, 8 East 330. Co. Lit. 172, a., and a single bill (being a

bond without condition,) given by him for necessaries, is binding: 8 East, 330. Co. Lit. 172. As, however, an account stated by an infant, even for moneys due for necessaries, is not valid; (1 Term Rep. 40,) and as the signature of a promissory note or bill of exchange by an infant, is equivalent to an account stated, and, if valid, might also, when in the hands of a bona fide endorsee, preclude the infant from disputing the original debt, it seems clear that no action can be supported against an infant on a bill or note, Chitty on Bills, 29.

As the contract of an infant is only voidable, and not absolutely void, he may, by a promise to pay the bill, made after he attains twenty-one, render it as operative against him, as if he had been of age at the time it was made.—4 Esp. Rep. 187.

Such promise, however, must be express; and a bare acknowledgment of the debt, is not a sufficient confirmation; nor will a promise to pay a part, or an actual payment of part, create any further liability.—2 Esp. 481, 628.

An infant, however, may certainly sue on a bill in his favour.—Kyd, 30. Bac. Ab. Infants.

A married woman cannot be a party to a bill of exchange, or promissory note, &c. though she be living apart from her husband, and have a separate maintenance secured to her by deed, (8 Term Rep. 545;) and a promise by her after the death of her husband will be of no avail; and a feme-covert sole trader in London, is not liable to be sued, as such, in the courts of Westminster.—1 Stra. 94.—2 Bos. & Pul. 93.

But sometimes a feme-covert is chargeable in equity; (Vin Ab. Baron & Feme, n. 3. pl. 4,) and when her husband is, in legal consideration, dead, as where he is transported, banished, &c., she may contract, so as to be liable at law.—1 Bos. & Pul. 358.*

*By an act of Assembly of Pennsylvania, passed in the year 1718, the wives of mariners and others who have gone to sea, leaving them at shop-keeping or to work for their living, at any other

Where a note was given by the defendant to a married woman, knowing her to be such, with intent that she should endorse it to the plaintiff, in payment of a debt which she owed him in the course of carrying on a trade in her own name, by the consent of her husband; yet it was held that the property in the note vested in the husband, and that no interest passed by an endorsement in her name to the plaintiff. But Lord Kenyon said, "That, as the husband permitted her to carry on trade on her own account, and this was a transaction in the course of that trade, if she had endorsed the note in the name of her husband, he was not prepared to say that that would not have availed, as many acts of this nature may be done by power of attorney, and the jury might have presumed what was necessary in favour of an authority from her husband for this purpose: but that the endorsement being in her own name, it is quite impossible to say that she could pass away the interest of her husband by it."—1 East. 432.—3 Esp. Rep. 266. S. C.

However, in the case of Coates v. Davis, (1 Camp. 485,) where a promissory note was made payable to a married woman, and she endorsed it in her own name, and the maker afterwards promised to pay it, it was held in an action against him by the endorsee, that it might be presumed that the nominal payee had authority from her husband to endorse it in that form, and the endorsement should be considered as vesting a legal title to the note in the plaintiff.

Except in the instance of an endorsement by a feme covert, it seems, that although a bill, &c. be drawn, endorsed, or accepted, by a person incapable of binding himself, it will nevertheless be valid against all other competent parties thereto.—3 Poth. pl. 29.—2 Atk. 182.—4 Esp. Rep. 187.

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trade in the province, shall be deemed and taken as feme-sole traders, and may contract debts, &c. on their own separate responsibility.

Thus, in an action against the acceptor of a bill of exchange, by the endorsee, it is no defence, that the drawer, who endorsed the bill, was, at that time, an infant; (4 Esp. Rep. 187.—2 Stra. 937.) and, though the circumstance of a bill of exchange having been endorsed by a married woman, in her own name, might preclude the holder from suing any anterior party, he will still be at liberty to sue any party to the bill who became so between her and himself.—Poth. c. 2. S. 1.

A corporation, by the intervention of its agent, may be a party to a bill of exchange.—1 Selw. N. P. 224.

Bills of exchange differ from most other contracts in the circumstance of there being frequently more than two parties to them. A bill has, indeed, previously to its being transferred, generally three parties. It is not, however, necessary that there should be three parties to a bill; there are sometimes only two; as where a person draws a bill upon another, payable to his own order; and indeed a bill will be valid where there is only one party to it; for a man may draw upon himself, payable to his own order, (Chitty on Bills, 37;) but, in such case, it is said, (Bayley on Bills, 26,) that the instrument is more in the nature of a promissory note, than a bill of exchange. It is by transfer of a bill of exchange, from one person to another, when it is negotiable, that the parties may become numerous; in which case, if the transfer be by endorsement, the person making it is called the endorser; the person in whose favour the transfer is made, the endorsee; and in all cases, the person in possession of the bill is called the holder.

The drawer, acceptor, endorser, and holder, are the principal and immediate parties to the instrument: but besides them a person may become a party to it in a collateral way; (Poth. pl. 25. 26,) as, where the drawee refuses to accept, any third party, after protest for non-acceptance, may accept for the honour of the bill, generally, or of the drawer, or of any particular endorser, in which case, the acceptance is called "an

acceptance *supra protest*," and the person making it is styled the acceptor for the *honour* of the person on whose account he comes forward; and he acquires certain rights, and subjects himself to nearly the same obligations, as if the bill had been directed to him. A person may also become party to the instrument by *paying it supra protest*, for the honour either of the drawer or the endorsers. The rights and obligations, attached to this collateral mode of becoming a party to a bill, will be spoken of hereafter.

With respect to the mode of becoming party to any one of these instruments, it is a general rule, that no person can be considered as a party to a bill, unless his name appears on some part of it; (3 Term Rep. 760;) however, a person may become drawer, indorser, or acceptor, not only by his own immediate act, but also by that of his agent or partner.

It is a general rule of law, that whenever a person has a power, as owner, to do a thing, he may consequently, as incident to his right, do it by attorney or agent.—9 Co. 75 b.—Kyd. 32. Hence, it is clear, that a person may draw, accept, and endorse a bill by his agent, as well as by himself.—Chitty on Bills 34. In these cases, he is said to draw, accept, and endorse, by procuration.—ibid.

As this agency is a mere ministerial office, infants, feme-coverts, persons attainted, outlawed, excommunicated, aliens, and others, though incapable of contracting on their own account, so as to bind themselves, may be agents for these purposes.—Co. Lit. 52 a.

With respect to the manner of their appointment, it is said, (Beawes pl. 86.—Marius, 2d ed. 104,) that there ought to be a formal power of attorney; but this is by no means necessary; for the authority which an agent has, to draw, endorse, and accept bills, in the name of his principal, may be, and indeed most usually is, by parol.—Chitty on Bills, 35.

As to the extent of the agent's authority, if a person

be appointed a *general* agent, as in the case of a factor for a merchant residing abroad, the principal is bound by all his acts; but an agent, constituted so for a particular purpose, and under a *limited* and *circumscribed power*, cannot bind the principal, by any act exceeding his authority.—ibid.

Therefore, where A. desired B. to get a bill discounted for him, but declared, that he would not endorse, it was decided by a majority of the court, that no representation of B. could bind A. as an endorser, though it was insisted that what B. had done was within the scope of his employment, which was to raise money on the bill. It appearing, however, on a second trial, that as A. did not declare that he would not endorse it, it was adjudged, that, as he had authorized B. to get the bill discounted, without restraining his authority, as to the mode of doing it, he was bound by his acts.—ibid 36.

Upon the question, what is a *general* authority, it has been decided, that a person signing his name on a blank stamped piece of paper, and delivering it to J. S. authorizes J. S. to insert any sum, which the amount of the stamp will warrant.—1 Hen. Bla. 313. —Doug. 514.

It has also been held, that a letter of attorney given by an executor to A. B. authorizing him to transact the affairs of the testator, in the name of the executor, as executor, and to pay, discharge, and satisfy all debts due by the testator, conveys to A. B. a sufficient authority to accept a bill of exchange in the name of the executor, drawn by a creditor for the amount of a debt due by the testator, and thereby to make the executor personally liable, on the ground that an authority of this nature necessarily includes all intermediate powers, that is to say, all the means necessary to be used in order to effect the accomplishment of the object of the principal, namely, the paying, satisfying, and discharging of the testator's debts.—2 Hen. Bla. 618.

But, in another case, (6 Term. Rep. 591.—1 Hen. Bla. 155,) which was upon the same letter of attorney, the court, after consulting with the judges of the common pleas, determined, that the executor was not personally liable, and that a power of attorney given by an executrix, to act for her as an executrix, does not authorize the attorney to accept bills to charge her in her own right, though for debts due by her testator.

So, in a late case it was decided, that where one gives a power of attorney to another, "to demand and receive all moneys due to him, on any account whatsoever, and to use all means for the recovery thereof, and to appoint attorneys for the purpose of bringing actions, and to revoke the same, and *to do all other business;*" the latter words must be understood with reference to the former, as meaning all business appertaining thereto; and, although the attorney may receive moneys due to the principal in *auter droit*, yet he cannot, under this power, endorse a bill for him, which comes to his hands.—2 Smith's Rep. 79, 80.

It has also been held, that a power of attorney to receive all salaries and moneys with all the principal's authority to recover, compound, and discharge, and to give releases, and appoint substitutes, does not authorize the attorney to negotiate bills received in payment, nor to endorse them in his own name; nor can evidence of a usage at the navy office, to pay bills, endorsed by the attorney in his own name, and negotiated by him, under such a power, be received to enlarge the operation of the power.—Chitty on Bills, 37.

An authority may also, in some cases, be *implied* and inferred, from prior conduct of the principal; and therefore, if a person has, on a former occasion, in the principal's absence, usually accepted bills for him, and the latter, on his return, approved thereof, he would be bound, in a similar situation, on a second absence from home; (Chitty on bills, 38;) and it has been held, that if a person usually subscribes an instrument with the name of another, proof of his having done so in many

instances, is sufficient to charge him whose name is subscribed, without producing any power of attorney. —1 Esp. Rep. 61.

It appearing from the above, that the principal will be bound by every act of his general agent, although he exceed his authority, it has therefore been observed, by way of caution, that it is incumbent on the employer to take particular care whom he authorizes, as otherwise, it may be of the most fatal consequence to him. —Beawes pl. 84; and, as it appears, (ibid. 231—12 Mod. 346,) that a master who has empowered a servant to draw bills of exchange in his name, is bound by acts done by such servant subsequently to leaving his service, unless notice has been given; it is therefore incumbent on every employer to give notice of such fact, to all his correspondents individually, notice in the gazette not being sufficient to affect a former customer, unless he has had express notice thereof.—Peake, 42, 154—1 Esp. Rep. 372.

As the authority of an agent is not coupled with an interest, he cannot delegate it, so as to enable another person to act for his principal.—9 Co. 75.—1 Rol. Ab. 330.

If, however, an express authority be given for that purpose, he may exercise it.—Bunb. 166.

An attorney or an agent must exercise his power in the name of his principal, and not in his own name. Signing J. B. by M. W. his attorney, and M. W. for J. B. is in either case, the act of the principal, and by his authority. There is no particular form of words required to be used, provided the act be done in the name of the principal.—2 East, 142.

A man acting without authority, or beyond his authority, binds himself, and no one else. The agent should stipulate for his principal by name, and also state his own agency in the instrument which he signs. —8 Mass. Rep. 178.—11 Mass. Rep. 27, 54, 97, 228.

With respect to a person becoming party to a bill, by the act of his partner, it is observable, that, although one joint-tenant, or person jointly interested with another, in real or personal property, is not capable, by himself, of doing any act which may tend to injure the other; yet, by the custom of merchants, long established as law, if one partner draw, accept, or endorse a bill or note, in the name, or on the behalf of the firm, such act will render all the parties liable to a *bona fide* holder, although the other partners were ignorant of the transaction, and were even intentionally defrauded by their partner.—1 Salk. 126.

By entering into the partnership, each party reposes confidence in the other, and constitutes him his general agent, as to all the partnership concerns; and it would be a great impediment to commerce, if, in the ordinary transactions of their trade, it were necessary that the actual consent of each partner should be obtained, or that it should be ascertained that the transaction was really for the benefit of the firm. Hence, the act of one, when it has the appearance of being on behalf of the firm, is considered as the act of the rest; and whenever a bill is drawn, accepted, or endorsed, by one of several partners, as on behalf of the firm, during the existence of the partnership, and it gets into the hands of a bona fide holder, the partners are liable to him, though in truth one partner only negotiated the bill, for his own peculiar benefit, without the consent of his co-partners.—Chitty on Bills, 41.

But, with respect to a person, who, at the time he received the instrument from the partner, knew, or had reason to suspect, that he negotiated it for his individual benefit, and without their concurrence, he cannot avail himself of the security, as binding on the firm.—ibid. 44.

It has been considered, that a bill being given for an antecedent debt due by one of the partners, raises a presumption that the creditor knew that the bill was given without the concurrence of the other partners,

(8 Ves. J. 540.—1 East, 53—1 Mont. 622;) and that the taking of the instrument from one of the partners in his own hand-writing, without consulting the others, raises a presumption that there is not any concurrence of the firm.—1 East, 53.

But, as a partner may, in his individual capacity, have a claim upon the firm, in respect of which he might draw, accept, or endorse a bill in its name, it seems to be now established, that the mere circumstance of the party to whom he delivers it, knowing that he was using it for his private benefit, does not afford sufficient evidence of collusion to invalidate the transaction.—8 Ves. J. 542, 544—2 Camp. 561, 2.—13 East, 175.

A strong case of subsequent approbation by all the partners, raises an inference of their previous authority having been given to the particular partner to sign the partnership name to a bill, or to negotiate it, and will subject the partners to a liability in a transaction where they would not have been chargeable without such subsequent assent.—1 Mont. 622.—Watson, 202.

Even in transactions in which all the partners are interested, the authority of one partner to bind the other, by signing bills of exchange or promissory notes, in their joint names, is only implied, and may be rebutted by express previous notice to the party taking the security from one of them, that the other would not be liable for it.—10 East, 264.—1 Salk. 291.

Where persons are partners only in a *particular* concern, and not *general* partners, they are not liable even to *bona fide* holders, on a bill issued by one in relation to a different concern.—6 Esp. Rep. 18.

After the dissolution of a partnership by agreement, one of the persons who composed the firm cannot put the partnership name upon any negotiable security, even though it existed prior to the dissolution, or even for the purpose of liquidating the partnership debts, notwithstanding such partner may have had authority

to settle the partnership affairs.—1 Hen. Bla. 155.—3 Esp. Rep. 108.—Watson, 209.

After notice of the dissolution of a partnership, published in the Gazette, (in London,) and sent round to the customers of the firm, if one of the partners who carries on the business under the old firm, draws, accepts, or endorses bills in the name of that firm, the other partners need not apply for an injunction against his doing so, for they are not liable upon such bills, given to a person ignorant of the dissolution of the partnership. (2 Camb. 617.)

Though it has been held, that notice in the Gazette, is not sufficient against persons who were customers of the firm, during the existence of the partnership, and that a particular notice should be given to each; it appears to be clearly established, that notice in the Gazette is at all events sufficient against all persons who have not previously had transactions with the firm.—Chitty on Bills, 48.

However, an admission made by one partner, after the dissolution, relative to a previous partnership transaction, will affect the firm.—1 Taunton, 104.

Wherever the law is silent, as to the extent of the above custom, it seems that evidence of the usage and custom of merchants is admissable, but not otherwise, (2 Burr. 1216, 1221—1 Bla. Rep. 295, S. C;) and therefore where two persons, who were not general partners, drew a bill on A. B. payable to their order, and separately signed it, not in the name of any supposed firm, and only one of them endorsed it with his own name, in an action at the suit of an endorsee against A. B. the acceptor, Lord Mansfield, on a new trial, admitted evidence to prove, that, by the universal usage, and the understanding of all the merchants in London, the endorsement was bad, because not signed by both the payees; and accordingly the defendant had a verdict; notwithstanding it was insisted that the validity of the endorsement was a question of law, and

although the court of king's bench, on the motion for a new trial, had previously declared their opinion in the same cause, that when a bill goes out into the world, the persons to whom it was negotiated, are to collect the state and relation of the parties from the bill itself; and that, if they appear on the bill as partners, it would be of less public detriment, to subject them to the inconvenience of being treated as such, than to permit them to deny that they are so; and that persons, by making a bill payable to their order, render themselves partners as to that transaction.—Dough. 653. *sed quaere.*

If a factor of an incorporated company, draw a bill on such company, and one member accept it, the acceptance will not bind the company, because it is a private act of the party, and not a public act of the company. —Bul. N. P. 279.—Beawes pl. 228.

Sometimes, an *express* authority is given by several partners to one, to act for them all, in which case, the person authorized acts as agent as well as partner, and his power and authority being express, he must be guided by it. An express authority given to one partner, after the dissolution of the partnership, to receive all debts owing to, and to pay those due from the partnership on its dissolution, does not authorize him to endorse a bill of exchange in the name of the partnership, though drawn by him in that name, and accepted by a debtor of the partnership after the dissolution.—1 Hen. Bla. 155—3 Esp. Rep. 108.

From this liability of partners to answer for the acts of each other, it is necessary, that, after the dissolution of their connexion, they should, in order to avoid the consequences of any one of the partners making, endorsing, or accepting a bill in their names, give notice in the Gazette, of the dissolution of the partnership; and even this notice, as has been before observed, is not sufficient, against persons who were customers during the partnership, unless they have actual notice of the dissolution; and the partners should therefore

give notice of the dissolution to their individual correspondents.—Chitty on Bills, 50.

SECTION III.

Of the form and requisites of Bills, &c.

Though a bill of exchange, check, promissory note, &c. must be in writing, there is in general no particular *form*, or set of words necessary to be adopted, any more than in the case of a bond or other deed; indeed the courts, considering the great utility of these instruments, and how much they tend to the extension of credit, and consequent advancement of trade and commerce, have uniformly gone farther in giving effect to them as instruments, than where a question has arisen on the formation of a deed.—Chitty on Bills, 53.

Thus, an order or promise to deliver money; (Lord Raym. 1397—8 Mod. 364, S. C;) or a promise that J. S. shall receive money; (8 Mod. 364;) or a promise to be accountable; (Chitty on Bills 54;) or responsible for it; (8 Mod. 364;) will be a sufficient bill or note; and where a note was in these words, "borrowed of J. S. £50, which I promise *never* to pay," the word *never* was rejected, and the holder recovered.—2 Atk. 32. —Bayley on Bills, 4 n. b.

It is however, advisable to draw bills, &c. according to the forms hereafter given.

There are two principal qualities essential to the validity of a bill or note;—*first*, that it be *payable at all events*, not dependant on any contingency, nor payable out of a particular fund; and *secondly*, that it be for the *payment of money only*, and not for the payment of money, and performance of some other act, or in the alternative; for it would perplex commercial transactions, if paper securities of this nature, encumbered with conditions and contingencies, were circulated, and if the persons to whom they were offered in negotiation, were obliged to inquire when these uncertain

events would probably be reduced to a certainty.—Chitty on Bills, 55.

Thus, an order or promise to pay money "provided the terms mentioned in certain letters shall be complied with;" or "provided J. S. shall not be surrendered to prison within a limited time;" or "provided J. S. shall not pay the money by a particular day;" or "provided J. S. shall leave the drawer sufficient;" "or he shall otherwise be able to pay it;" or "to pay when or within so many days after J. S. shall marry;" or, "if the plaintiff should be married within two months;" or to pay a sailor wages "if he do his duty as an able seaman;"—is no bill, on account of the contingency to which the payment is subject.—ibid.

So, if the payment depend on the sufficiency of a particular fund, the bill &c. will be invalid; as, an order or promise to pay "out of the drawer's growing subsistence;" or "out of a named payment when due;" or "out of money when received;" or "out of purchase money," or "out of the drawer's money that should arise from his reversion when sold;"—is no bill or note, on account of the uncertainty whether the subsistence or payment will become due, or the money be received.—ibid.

So, an order to pay a sum of money out of rents, or other money, in the hands of the person to whom it is addressed, is no bill, because he may not have rent or other money in his hands, sufficient to discharge it. So, an order from the owner of a ship, to the freighter, to pay money "on account of freight," is not valid, because the quantum due on freight may be open to litigation.—ibid.

A note made payable to order, on a certain day, or when the promisee should complete a certain building, is payable on a day certain, and of course negotiable. —7 Mass. Rep. 240.

Also, a note "to pay to A. or order, six weeks after the death of the defendant's father, for value received,"

was held to be negotiable within the statute.—1 Str. 1217—Willes, 393, S. C.

A promissory note for *goods* is not negotiable.—2 Mass. Rep. 524.

So, if payable in *foreign bills*; and it makes no difference, in such cases, whether made payable to *bearer* or *order*.—4 Mass. Rep. 245.—6 Mass. Rep. 182.—7 Mass. Rep. 448.

A note promising to pay A. B. or order, five hundred dollars, "in bank notes of the chartered banks in Pennsylvania," is not a negotiable note, on which the assignee can sue in his own name.—10 Serg. & R. 94.

But in New York the contrary seems to have been ruled, on the ground that bills, or bank paper according to mercantile usage, are regarded as cash.—9 John Rep. 120.

In New York, a note not negotiable, cannot be declared on as a promissory note, but the consideration must be set forth specially, and proved.—2 John. Rep. 235.

But it has been since ruled, that the words "value received," in a note, are *prima facie* evidence of a consideration, so as to throw the burthen of proof on the defendant.—7 John. Rep. 321.

An order or promise to pay a sum of money, *or* surrender J. S. to prison; or to deliver up horses, *and* a wharf, and pay money on a particular day; or to pay £300 to B. or order, "in three good East India Bonds," is not valid.—ibid.

It is now fully settled, that the words "value received," are not necessary to be inserted in bills or notes; for, as these instruments are always presumed to have been made on a valuable consideration, words which import no more, cannot be essential.—3 Cain, 286.

If a bill, note, &c. be insufficient in its formation in

either of these two principal qualities—*first*, "that it be payable at all events," and *secondly*, that it be for the "payment of money only,"—it will not become valid by any subsequent occurrence rendering the payment no longer contingent; and the bill, &c. will not be negotiable, nor can it be declared on as a bill, even between the original parties.—ibid. 56.

When it appears, by any part of the instrument, that the money was not payable immediately, and that the payment was to depend on an uncertain event, it will not operate as a bill of exchange or a promissory note, but as a special agreement.—2 Campb. 6, 417.

If, however, the event on which the instrument is to become payable, must inevitably happen, at some time, it has been decided to be of no importance how long the payment may be in suspense.—Stra. 1217. S. C.—1 Burr. 226.

Therefore, if a bill be drawn, payable six weeks after the death of the drawer's father; (Stra. 1217, 1 Mont. 128.) or payable to an infant, when he shall come of age, specifying the day when that event will happen, it will be valid and negotiable.—1 Burr. 226.—2 Bla. Com. 513.

There are also decisions, that if the event on which the payment is to depend, be of public notoriety, and relating to trade, and there be a moral certainty of its taking place, the bill &c. will be valid.—Chitty on Bills, 59.

So, it has been reported to have been decided, that if a bill or note be payable two months after a certain ship be paid off, (Willis 899, note 2: *sed quære*;) or be payable on the receipt of the payee's wages, due to him from a certain ship, it is valid.—ibid. But this last decision also seems questionable.—Selw. N. P. case of Beardesley, v. Baldwin.

The statement of a particular fund, in a bill of exchange, will not vitiate it, if it be inserted merely as a

direction to the drawee, how to reimburse himself; and therefore, a bill, requesting the drawee, one month after date, to pay the plaintiff, or his order, a certain sum of money, "as my quarterly half pay, to be due from the 24th June, to the 27th September next by advance," was decided to be a valid bill; because it would be payable, though the half pay might never become due; (Stra. 762.—Ld. Raym. 1481.—1 Barnard, 12 S. C.) and an order from the freighter of a ship, to pay money on account of freight, is sufficient, because it is an admission that so much at least is due.—Cowp. 571.—Str. 1112.; though we have seen that an order from the *owner* of a ship, to the freighter, to pay money on account of freight, is not valid.

Nor will a bill be vitiated, by the insertion of words, pointing out the consideration of the acceptance: as for instance, "value received out of the premises in Rosemary Lane," (Lord Raym. 1545,) or, "being a portion of a value, as under, deposited in security, for the payment hereof:" (7 Term. Rep. 733;) or "on account of wine had from the drawer."—6 Mod. 29.—Mod. Ent. 312.

It must, however, be observed, that, in most of the cases where the several instruments have been denied the privilege of bills and notes, it is not, for that reason, to be concluded that they are of no force. When the fund from which they are to be paid, can be proved to have been productive, or the contingency on which they depend has happened, they may be used as evidence of a contract, according to the circumstances of the case, or according to the relation in which the parties stand to one another.—Bay's Rep. 368.

Besides those principal qualities which bills of exchange must possess, there are certain other matters, proper to be attended to, in their formation. These are:—

1. That in certain cases, the instrument be properly stamped.

(No stamps are now required in any of the states of the American union; but they were requisite during the late war.)

2. That it be properly dated.

3. That the time of payment be clearly expressed.

4. That it contain an order, or, at least, a request to pay.

5. That, in the case of a foreign bill, drawn in sets, each set contain a proviso, that it shall be payable only in case the others are not paid.

6. That it be clearly expressed, to whom the bill is payable.

7. That, where the instrument is intended to be negotiated, there be words inserted, giving the power of transfer.

8. That the money to be paid be distinctly and intelligibly expressed.

9. That, in certain cases, "value received," be inserted.

10. That, under particular circumstances, a bill state whether it is to be paid "with," or "without further advice."

11. That the drawer's name be clearly signed.

12. That the bill be properly addressed to the drawee.

13. That, where the bill is to be paid at a certain place, that place be properly described.

The best mode of considering each of these matters will be, by presenting the reader with the usual forms of a foreign and inland bill of exchange, and of a check, and then considering the various parts of each in their proper order.

Form of a Foreign Bill.

No.

Exchange for 5000 Livres Tournoises.

Baltimore, October 1, 1830.

At two usances, (or "at after sight," or "at after date,") pay this my first bill of exchange, (second and third of the same tenor and date not paid) to Messrs. ———, or order, ("or bearer,") Five Thousand Livres Tournoises, value received of them, and place the same to account, as per advice from.

Edward Smith.

To Mr. ——— in Paris.

Payable at ———

Form of an Inland Bill.

$500,00 Baltimore, Oct. 1, 1830.

Two Months after date (or "at sight," or "on demand," or "at days after sight,") pay Mr. ——— or order, Five Hundred Dollars, for value received.

Henry Jones.

To Messrs. Berry & Co.
Philadelphia.

Form of a Check.

No.

Philadelphia, November 1, 1830.

Farmers' and Mechanics' Bank.

Pay to A. B. or Bearer, One Hundred Dollars.

J. Kline.

100 Dollars, 00 Cts.

(1) It is unnecessary to offer any remarks on the subject of the stamp.

(2) It is proper in all cases, to superscribe the name of the place where the bill is made, and when the maker is a person not well known in the commercial world, it is advisable for him to mention the number of his house, and the street in which he resides, in order that the holder may be the better enabled to find him out, in case his responsibility is doubted, or in case acceptance or payment is refused by the drawee.

(3) As the time when a bill is to become due, is generally regulated by the time when it was made, the *date* of the instrument (when it is drawn "after date,") ought to be clearly expressed; (Beawes pl. 3.—Mar. 2d. ed. 91.) and, although it is the common practice to write the date in *figures*, yet, in order to prevent intentional or accidental alteration, which may invalidate the instrument, even in the hands of an innocent holder, (4 Term. Rep. 320,) it may be advisable to write the date at full length, in *words*. A date, however, is not, in general, essential to the validity of a bill; for, where a bill has no date, the time, if necessary to be inquired into, will be computed from the day it was issued; (Ld. Raym. 1076.—4 Term. Rep. 337;) and, if a bill of exchange be made payable two months after date, and no date be expressed, the court will intend it to be payable two months after the day on which it was made.—3 Bos. & Pul. 173.

(4) There is no necessity for the superscription of the sum for which the bill is payable, provided it be mentioned in the body of the bill; but the superscription will aid an omission in the body; (2 East's Cro. Law. 951, 2.) and it is now the usual mode, to superscribe the sum payable, in figures at the head of the instrument, and in words in the body of it.—In drawing a check on a bank, the sum is generally *subscribed*.

(5) It is advisable, in all cases, to express the time of payment as clearly and intelligibly as possible, and it is

therefore usual to write it in words, particularly as they are less subject to alteration, than figures; and where a bill is drawn in one country, using one style and payable in a country using another, it is said that the drawer sometimes makes the date, according both to the old and new style.—Kyd. 8.—Mar. 91.

With respect to the time when payment is to be made, it depends entirely on the agreement of the parties; and there is no limitation in point of law, though the payment must not be contingent. Foreign bills are frequently drawn payable at usance, or usances; but, like inland bills, they may be drawn payable at sight, or at days, weeks, months, or years, after sight or date, or on demand. Bills, however, are very seldom drawn payable on demand; but usually, when it is intended that they should be payable immediately, are drawn payable at sight.—Poth. pl. 174.

With respect to the time when a bill, drawn payable in either of these ways, becomes due, the reader is referred to that part of this work which treats of the presentment for payment.

(6) It is said by Beawes, in his Lex. Merc. (pl. 3.) that payment of a bill should be *ordered* and commanded: it is sufficient, however, if it be *requested.*—Ld. Raym. 1397.—1 Esp. Rep. 129.

(7, 8) Inland bills, checks, and notes, consist of only *one* part, but foreign bills, in general, consist of *several* parts, in order that the bearer, having lost one, may receive his money on the other; (Poth. pl. 39.—Bayl. 14.) but if the drawer give only one bill, he will, if it should be lost, be obliged to give another of the same date, to the loser; Poth. pl. 39. on his giving a sufficient bond to indemnify the drawer against any future demand.

The several parts of a foreign bill are called a *set.* Each part contains a condition, that it shall be paid, "provided the other remains unpaid." In other re-

spects, all are of the same tenor. This condition should be inserted in each part, and should, in each, mention every other part of the set; for if a person, intending to make a set of three parts, should omit the condition in the first, and make the second with a condition, mentioning the first only, and in the third alone take notice of the other two, he might, perhaps, in some cases, be obliged to pay each; for it would be no defence to an action by a bona fide holder on the second, that he had paid the third, nor to an action on the first that he had paid either of the others.—Bayl. 15.—Beawes, 430. Poth. 111. But an omission is not, perhaps, material, which, on the face of the condition, must necessarily have arisen from a mistake; as if, in the enumeration of the several parts, one of the intermediate parts were to be omitted; for instance, "pay this my first of exchange, second and fourth not paid."—Bayl. 15.

Where a bill consists of several parts, each ought to be delivered to the payee, unless one be forwarded to the drawee for acceptance; otherwise, there may be difficulties in negotiating the bill, or obtaining payment.—ibid.

The forgery of an endorsement of the payee on one of the parts, will not pass any interest, even to a bona fide holder; and the real payee may sustain an action on the other part.—3 Term Rep. 127.

(9) A bill of exchange and promissory note must specify to whom it is to be paid, and it is said, that otherwise it will be merely waste paper.—1 Hen. Bla. 608. But Pothier observes, (pl. 31.) that, if the drawer have omitted to mention any person to whom the bill is to be paid, declaring in the bill, however, from whom he has received the value, it is but reasonable to construe the instrument to be payable to that person.

A bill may be drawn payable to bearer, and in such case it will be transferrable by delivery.—3 Burr. 1527.—Bayl. 12.

In France, bills of this description were at first forbidden, but by a subsequent law they were established. Poth. pl. 221. In that country, it appears that it was formerly usual to make bills payable to a person whose name was left in blank, in order that the holder of the bill, when he was desirous of not being known, might fill it up with any name he chose; but, as these bills were employed as a cloak for usury and fraud, they were afterwards prohibited. *Arrets de Reglements de la Cour du 7 Juin*, 1611, *et du Mars*, 1624. These bills seem to have been in the nature of those payable to a *fictitious payee*, the validity of which has been so frequently and fully discussed, of late, in our courts of justice; the result of which discussion seems to be, that a bill payable to a fictitious person or his order, is, in effect, a bill payable to bearer, and may be declared on, as such, against all the parties, knowing that the payee was a fictitious person.—Chitty on Bills, 79.

The use of these fictitious names has been highly censured, and the person endorsing the fictitious name on the bill, to give it currency, would be guilty of forgery.—ibid. 80.

As it is not necessary, or essential to the validity of a bill of exchange, that there should be three parties to it, a bill may be drawn payable to the drawer himself; though, in such case, it is said to be more in the nature of a promissory note.—1 Salk. 130.

A bill may also be payable to one for the use of another.—Chitty on Bills, 81.

When drawn payable to a married woman, it is payable to the husband, and transferrable only in his name. —1 East. 432.—4 Term Rep. 616.

If the name of the person to whom the bill is payable, should be altered, erased, or interlined, before acceptance, this will not justify the acceptor's refusal to pay it, when due, to the person whose name has been so mended or interlined, as he must or ought to have

taken notice of so essential a particular, when he accepted the bill.—Beawes, Lex. Mer. 440.

(10) The modes of making a bill transferrable, are, by drawing it either payable to A. B. or *order*, or to A. B. or *bearer*, or to the drawer's own order, or to *bearer* generally. The use, operation, and effect of each of these forms of words, will be pointed out hereafter, in that part of the work which treats of the transfer of bills and checks.

(11) If the sum in the superscription of the bill, be different from that in the body of it, the sum mentioned in the body will be taken, *prima facie*, to be the sum payable.—Beawes, pl. 193.—Mar. 2d ed. 138, 9.—2 East. pl. Cr. 951.

(12) It appears, that in France, it was essential to the validity of a bill, not only that it should express whether or not value had been received, but likewise the nature of the consideration which constituted the value; (Poth. pl. 8, 34.) but in England [and the United States] it is otherwise, for *value received* is implied in every bill and endorsement, as much as if expressed in so many words; (Chitty on Bills, 83.) and it is now settled, that a bill need not contain the above words.—ibid.

SECTION IV.

Want of consideration, when material.

Bills of exchange and negotiable promissory notes, are distinguished from all other parol contracts, by the circumstance, that they are prima facie evidence of valuable consideration, both between the original parties, and against third persons.—5 Wheat. 277.

In an action by the bona fide holder of a negotiable note, received before due, against the maker, the consideration cannot be inquired into, if the instrument be not in its creation, void.—3 Caines' Rep. 279.

The holder of a bank check is, prima facie, the

rightful owner, and is not bound to prove a consideration, unless circumstances of suspicion appear.—3 Johns' Cases, 5.

But, where there is reason to expect that a defence will be attempted on the want of consideration, the plaintiff should be prepared, on the trial, to prove what value he gave for the bill, &c; and, in a late case, it was decided, that, in an action by the endorsee against the drawer of a bill of exchange, if it appear that the defendant drew the bill without consideration, and under duress, it is incumbent on the plaintiff to prove that he gave value for it, though it was endorsed to him before it became due.—Campb. Ni. Pri. 100.

Though a bill of exchange, prima facie, imports a consideration, yet where a strong ground is laid to show the want of consideration, or an illegal consideration, the holder must show that value was given for it.—2 Wash. C. C. R. 460.

Wherever the holder of negotiable paper has notice, either positively or constructively, of any equity subsisting between the original parties, he takes it subject to such equity.—4 Dallas, 371.

Between the drawer and the acceptor, the drawer and the payee and his agent, and the endorsee and his immediate endorser, the want of consideration, or the original insufficiency of the amount thereof, may be questioned.—Chitty on Bills, 88.

Thus, in an action on a bill given for goods sold under a warranty, the breach of the warranty is an answer to the plaintiff's demand, if the defendant has immediately tendered back the goods, though the plaintiff did not accept them.—2 Taunt. 2.

Where a bill is for accommodation, and the holder has given value only for a part of the amount, he cannot recover upon the bill beyond that sum.—Chitty on Bills, 89.

But when a bill is drawn for money really due by

the drawee to the drawer, in such case the endorsee, though he has not given to the endorser the full amount of the bill, may recover the whole, and be the holder of the overplus to the use of the endorser.—1 Esp. Rep. 261.—Cooke, 157.

Where, on the return of *non est inventus* on the *ca. sa.* against the principal in the suit, the bail gave a note for the amount of the judgment, which was afterwards reversed on a writ of error, it was held, that, as the bail was not fixed, and the judgment was reversed, there was a failure of the consideration of the note, and the plaintiff was not entitled to recover.—3 Johns. Rep. 465.

SECTION V.

Illegality of consideration; when it vitiates.

Whenever the defendant is at liberty to insist on the want of consideration as a defence, he may also insist that the consideration was *illegal.*—1 Bla. Rep. 445.

A contract is always legal, if it be not repugnant to the revealed law of God; to the general policy of the common law, or to some legislative provision.

Illegal considerations are distinguishable into three heads:—

1. The doing an act *malum in se*, or *malum prohibitum.*

2. The omission of the performance of some legal duty.

3. A stipulation encouraging such crime or omission. —1 Bla. Com. 57, 58.—Co. Lit. 206. b. n. 1.

Illegal considerations are either those void at common law, or those void by statute.

First: Considerations illegal at common law, are those which are injurious to the community at large; or those which affect the person or interests of an individual.

Those of the former description are:—

1. Stipulations in "general restraint of trade:" as if a party engage not to carry on a trade in any part of England. But, if the restraint be qualified, so as only to preclude the party from trading in a particular place, or within a certain distance—as, for instance, ten miles—and the breach of the stipulation tend apparently to the detriment of the party in whose favour it was made, and a consideration was given by such party, the contract will not be impeached, either at law or in equity.—2 Saund. 156. n. 1.—1 Powell on Contracts, 167.

2. A stipulation repugnant to the custom and excise laws of the country, as smuggling, &c.

3. Discontinuing a criminal prosecution, or suppressing evidence, or soliciting a pardon, or compounding a felony, misdemeanour, or other public crime, unless it be with leave of the court.—Chitty on Bills, 95.

A note given by an insolvent to his creditor, to induce him to sign his certificate under the insolvent law, with a blank for the date of it, to be filled up after his discharge, is void, because against the general policy of the law. Nor can it be revived, by a subsequent promise to pay it.—3 Caines' Rep. 213; and a note given to a creditor, to induce him to withdraw his opposition to the debtor's discharge, under the insolvent law, is void.—12 Johns. Rep. 306.

4. The recommendation to, or purchase of, an office under government.—Bro. C. C. 114.—Bayl. on Bills, 122.

5. Every illegal wager, repugnant to the principles of general policy; as a wager between voters on the event of an election.—1 Term Rep. 56.—11 East. 46.—2 Bos. & Pul. 151; upon the event of a war.—7 Term Rep. 535.—1 Term Rep. 57; and cricket, a horse-race, or a foot-race, against time, is a game, within the statute.—9 Ann.—1 Wils. 220.—2 Wils. 36.

6. In general restraint of marriage.—Burr. 2225.

7. Procuration of marriage.—Co. Lit. 206. b. and see note 1.

8. Future illicit cohabitation; but *past* cohabitation is a legal consideration.—Chitty on Bills, 93. So, any stipulation, injurious to the feelings or interests of a third person, and made without his concurrence; as a wager respecting the sex of a third person; or contrary to the benevolent intention of others, as a secret stipulation, contrary to a composition with creditors, is illegal.—ibid. 94.

Secondly: Some considerations, as well as contracts, are declared invalid by statute; as *usury*, by the 12 Ann, stat. 2. c. 16. Usury affects the contract, even in the case of a bill of exchange in the hands of a bona fide holder; but a second security, given to the bona fide holder of a bill, or for what is fairly due, is in general valid.—ibid. 95.

A gaming consideration is declared illegal by the statute 16 Car. II. and 9 Ann. Under these statutes, also, a bill of exchange or promissory note given for a gambling debt, is void, even in the hands of a bona fide holder.

Where a third person, having given value for a bill, knew, at the time he became the holder, that it was originally founded on an illegal transaction;—Chitty on Bills, 98; or where a person became holder of such a bill after it became due, he cannot recover on it.—7 Term Rep. 630.

But a person, who, at the request of the holder of a bill, endorses it, and is obliged to pay the contents to a bona fide holder, may recover the money paid, from any person whose name is on it.—Chitty on Bills, 98.

A bill of exchange is void in the hands of a bona fide endorsee, if it were drawn in consequence of a usurious agreement for discounting it, although the

drawer, to whose order it was payable, was not privy to this agreement.—2 Camp. 599.

Unless, however, it has been so expressly declared by the legislature, illegality of consideration will be no defence in an action at the suit of a bona fide holder, without notice of the illegality, unless he obtained the bill after it became due—Chitty on Bills, 99; and a broker receiving an exorbitant brokerage on the discount of a bill, will not affect its validity in the hands of a bona fide holder.—11 East. 43.—2 Camp. 33. S. C.

But now, by 58 Geo. III. (10th June, 1818,) it is enacted, that no bill of exchange or promissory note, drawn or made after the passing of this act, shall, though it may have been given for a usurious contract, be void in the hands of an endorsee for valuable consideration, unless such endorsee had, at the time of discounting or of paying such consideration, actual notice that such bill or note had been actually given for a usurious consideration, or upon a usurious contract.

Where a party is *compelled* to take goods in discounting a bill of exchange, a presumption arises that the transaction is usurious; and to rebut this presumption, evidence must be given of the value of the goods, by the person who has supplied them, and sues on the bill.—2 Campb. N. P. C. 376.

But where, on discounting a bill, a proposal is made that goods shall be taken, although such proposal originate with the plaintiff, yet if the other party readily accedes to it, conceiving that he will make a profit by the transaction, the presumption is, that the goods are charged beneath their value, and it lies upon the defendant to prove the contrary, if he would impeach the plaintiff's title to the bill on the ground of usury.—ibid. 558.

Where a bill of exchange is partly given for an illegal consideration, the whole is void.—3 Taunt. 226.—sed. vide. 3 Camp. N. P. C. 9. contra.

Where a promissory note has been given in the island of St. Domingo, for the consideration of the sale of a certain number of negro slaves, both parties to the note being French subjects, and an edict of the French government having declared the abolition of slavery, and suspended all suits brought for the purchase money of negroes, it was held that the parties were bound by the French law, and that, consequently, no suit could be maintained upon the note.—4 Dall. 419.

Where a new security is taken, in lieu of another, void in respect of usury, &c., it will be equally invalid in the hands of the party to the first illegal transaction, but not if in the hands of a bona fide holder.—8 Term Rep. 390.—3 Esp. Rep. 210.—4 Esp. Rep. 264; and after usurious securities to a loan have been destroyed by mutual consent, and there is a fresh contract by the borrower to repay the principal and legal interest, such fresh contract is valid.—1 Campb. 187.—ib. 2.—Taunt. 184.

If a note be originally good, no intermediate usurious transaction shall affect it in the hands of a subsequent innocent endorsee.—1 Bay, 486.

SECTION VI.

How bills, &c. are construed, and effect given to them.

The time of payment is in general to be calculated according to the laws of the country where the bill is made payable.—Beawes, pl. 251.—5 East, 130.

Where an action was brought by an endorsee of a bill of exchange against the acceptor, and he could not prove an endorsement by the payee, evidence was admitted to prove that the payee was a fictitious person, and consequently could not endorse it; and it was adjudged, that, as the drawer and acceptor knew of such fact, the bill should, against them, operate as a bill payable originally to bearer, and that the holder might recover thereon as such.—1 H. Bla. 569.

On a promissory note, in form, "I promise to pay, &c." subscribed by two persons, an action lies against one. Such note is joint and several.—7 Mass. Rep. 58.

Where one gives a promissory note as guardian, he is liable personally for the payment. The trust is inserted only to entitle him to indemnity from his ward, with which the promisee has no concern.—6 Mass. Rep. 58.

The courts have always, in mercantile affairs, endeavoured to adapt the rules of law to the course and method of trade and commerce, in order to promote it, and when new cases have arisen on the mercantile law, they consult traders and merchants as to their usage in regard to bills.—Willes, 561.—Barnes, 164. S. C.

Where no time of payment is mentioned in a note, it is payable immediately.—8 Johns. Rep. 374.

Bank checks are considered as inland bills of exchange, and may be declared on as such; and the holder of such a check or bill is, prima facie, the rightful owner, and is not bound to prove a consideration, unless circumstances of suspicion appear.—3 Johns. Cases, 5.

A note without consideration is a *nudum pactum;* and void as between the original parties to it.—7 Johns. Rep. 26.

An English merchant, living in Manchester, in England, drew his bill of exchange, payable to himself or order in London, upon an American house, having their domicil in Boston, which was accepted by one of the house then in Manchester. This was held to be a foreign bill, and to have the same effect as if accepted by the house at Boston, payable in London.—6 Mass. 157, 162.

A person who signs a note in the name of another as his attorney, without any authority for that purpose, is personally liable on the note to the party who ac-

cepts the note, under such mistake or imposition.—3 Johns. Cases, 70.

A bill of exchange, drawn by A. in the West Indies, upon himself at Philadelphia, is to be governed by the laws of Pennsylvania, where it was payable.—3 W. C. C. R. 313.

SECTION VII.

Delivery of a bill to the payee; and the effect thereof.

A person by taking a bill of exchange, &c. in satisfaction of a former debt, or of a debt created at the time, is precluded from afterwards waiving it, and suing the person who gave it to him, for the original debt, before the bill is due; for the taking of the bill amounts to an agreement to give the person delivering it, credit for the length of time it has to run.—Chitty on Bills, 113.

If the person delivering a bill, knew that it was of no value, the holder, on discovering the fraud, will not be precluded from immediately suing such party on his original liability.—ibid. 114.

But the mere circumstance of a bill being on a wrong stamp, will not entitle the holder to sue the party before it is due, unless he refuse, on request, to give a proper bill.—ibid.

Bills, in lieu of which other bills were given, if permitted to remain with the holder, may be sued upon, in case the latter bills are not paid.—7 Ves. jun. 597.

If there be an antecedent debt, and a bill be received, without taking an endorsement, which bill turns out to be bad, the demand for the antecedent debt may be resorted to.—10 Ves. jun. 206.

If there be no antecedent debt, and A. carries a bill to B. to be discounted, and B. does not take A's name upon the bill, if it be dishonoured, there can be no demand; for there was no relation between the parties,

except that transaction; and the circumstance of not taking the name upon the bill, is evidence of its purchase.—ibid.

In a sale of goods, the law implies a contract that those goods shall be paid for. It is competent to the party to agree that the payment shall be by a particular bill. In this instance, it would be extremely difficult to persuade a jury, under the direction of a judge, to say "an agreement to pay by bills was satisfied by giving bills, whether good or bad."—ibid.

SECTION VIII.

Effect of the alteration of a bill, &c.

If a bill, &c. be altered in any *material* respect, as for instance in the date or sum, without the consent of the drawer, it will, at common law, and independent of the stamp-acts, discharge him from liability on the bill, though it may afterwards come into the hands of an endorsee not aware of the alteration; and, if it be altered after acceptance or endorsement, without the acceptor's or endorser's assent, such alteration will have the same effect as to their liability.—4 Term Rep. 320.—3 Esp. Rep. 155; and a material alteration, even by a stranger, will equally vitiate the bill, &c.—4 Term Rep. 320.—sed vide 6 East, 309; and where there is no privity between the holder and the party sued, the former cannot recover, even for the consideration of the bill.—4 Term Rep. 325, 330.

The effect of an alteration will be the same, although the day of payment be thereby retarded.—3 Yeates, 391.—7 S. & R. 508.

But an alteration in a part of the bill which is *not material*, as, for instance, the insertion, in the acceptance, of the place where the bill is to be presented for payment, will not discharge the acceptor, &c.—3 Esp. Rep. 57.—Campb. Ni. Pri. 82; and the correction of a mistake, in furtherance of the original intention of

the parties—as the introduction in a bill of exchange of the words, "or order," which have been omitted by mistake, will not, in England, invalidate the bill, &c. or render a new stamp necessary, if made before the bill was circulated.—Chitty on Bills, 119.

The author of this work, however, advises, that no alteration, even of the most trivial character, be made in any bill, note, due-bill, or check. Such alteration may cause serious inconvenience; and might possibly subject an innocent holder or negotiator to an indictment for forgery, at the prosecution of a fraudulent or vindictive party.

In general, if a bill has been altered before acceptance or endorsement, the acceptor or endorser cannot take any advantage of the alteration.—Beawes, pl. 194; and the consent of any one of the parties to the alteration, will, in general, preclude him from objecting to it.—4 Term Rep. 320.

If, upon a bill being presented for acceptance, the drawee alters it as to the time of payment, and accepts it so altered, he vacates the bill as against the drawer and endorsers. But if the holder acquiesce in such alteration and acceptance, it is a good bill, as between him and the acceptor; and keeping the bill, and presenting it for payment at the deferred period, is proof of such acquiescence.

SECTION IX.

Liability of the drawer.

The drawer of a bill is bound to indemnify the acceptor, if he should have no effects in hand, for any loss that he may sustain in consequence of his acceptance.

If the bona fide owner of a bank-note, cut it into two parts, and send the parts in different letters, he may recover the whole amount from the bank, on pro-

ducing one of the parts.—2 Wash. C. C. R. 172. —Martin v. Bank U. S., C. C. Nov. 1821, M. S.

And a notice by the bank, that notes voluntarily cut by the owner, would not be paid unless all the parts should be brought together, does not alter the law, although notice were brought home to the party by whom the notes were cut.—Martin v. Bank U. S. as above.

But, in case a demand be made upon a bank, where only half of a note is presented for payment, a bond of indemnity may be required, to guarantee the bank against the appearance of the remainder.

If the endorser of a note sign a general release to the drawer, before the note becomes due, of all actions, causes of actions, and demands, which he then had, or might in future have against the drawer, by reason of any act, matter, cause, or thing, prior to the date of the release, he cannot, if he pays the note afterwards, maintain an action against the drawer.—1 Serg. & Rawle, 398.

If an order be only an authority to receive money, and it have not an effect during the life of the drawer, it becomes void by his death.—Addis. Rep. 33.

Until actual payment of the bill, the acceptor cannot maintain an action against the drawer; and if he pay after the certificate of bankruptcy of the drawer, he is not barred by the certificate.—2 Wash. C. C. R. 393.

A factor, indebted to his principal, remitted to him a bill drawn by himself, as payment. The bill being protested, the principal refused to receive it in payment, and returned the first of the set. Held, that the bill was cancelled from the time that it was returned, and that the payee could not afterwards negotiate the second bill of the set, so as to subject the drawer to an action on it.—2 Dall. 134.

A drawer or endorser of a foreign bill of exchange, is liable to the expenses of the protest, and the damages for re-exchange, or to a rate of damage established by usage; but not to the expenses of suits against other parties, or to any remote and consequential damages, unless in virtue of some additional and express contract of indemnity.—9 Mass. Rep. 1.

No action can be sustained against a consul on a bill of exchange drawn by him, in his official capacity on his government.—3 Dall. 384.

The acceptor of a bill of exchange for the accommodation of the drawer, is entitled to recover from the drawer only the amount actually paid by him: if he has paid nothing, he can recover nothing.—2 Wash. C. C. R. 44.

Until actual payment, therefore, no cause of action arises; and, if such payment be made subsequent to the certificate of bankruptcy of the drawer, such certificate is no bar to the action.—ibid. 393.

If a bill of exchange be drawn by A., with directions to charge the same to B., and it is accepted generally, and paid, the drawer is not liable to the drawee, unless it appear that B. was the agent of A. The direction to charge, was intended merely to point out the fund, out of which the bill was to be paid.—3 Wash. C. C. R. 503.

The endorser of a bill can recover against the drawer, only so much as he has been obliged to pay to the holder; and it is not enough that the holder acknowledge satisfaction to him, if in truth nothing were paid. —2 W. C. C. R. 44.

SECTION X.

Liability of the drawee.

The entry of a check as cash, made by the officer of a bank in the private bank-book of the holder, is equivalent to a payment.—4 Dall. 234. S. C. 1 Binn. 27.

If a forged check be credited as cash in the bank-book of the holder, who, on being informed of the forgery, agrees, under a mistake of his right, that if the check be really a forgery, it is no deposit, he is not bound by his agreement.—ibid.

The defendant having ordered plaintiff to purchase salt for him, and to draw on him for the amount, and he, having so purchased and drawn, defendant is bound to accept and pay his bills; and, if he do not, plaintiff may recover the amount of the bills and damages, and costs of protest, if he has paid them, on a count for money paid, laid out, and expended; and the bills of exchange may be given in evidence on that count.—7 Cranch, 500.

Where a banker paid a check the day before it bore date, which check had been lost by the payee, it was held that he was liable to pay the amount to the loser, it being proved to be contrary to the usual course of business, to pay drafts before the day on which they are dated.—Sel. Cas. 238.

If the drawee writes upon a bill that which essentially injures and defaces it, he will be liable as for an acceptance.—4 Esp. Rep. 270.—6 East. 199.

SECTION XI.

Of the endorsement and transfer of bills, &c.

When a bill, &c., has been unduly obtained, the negotiation of it may be restrained by a court of equity. This court has a peculiar jurisdiction to prevent a party

from being sued at law, upon a security which has been unduly obtained, and to order it to be delivered up to be cancelled.—Chitty on Bills, 127.

If endorsed bills be delivered to an agent, &c., for a particular purpose, and he negotiate them to a third person, not knowing of the trust, the latter will become beneficially entitled to the bills, however fraudulent the conduct of the agent.—1 Bos. & Pul. 546; and if A. deposit bills endorsed in blank, with B., his banker, to be received when due, and the latter raise money on them, by pledging them with C., another banker, and afterwards become bankrupt, A. cannot maintain trover against C. for the bills.—ibid. 648; and though, in general, a factor cannot pledge the *goods* of his principal, it is otherwise in the case of a bill.—6 East. 21.—But see 1 Bos. & Pul. 398.

If a note be not regularly negotiated to the endorsee, so as to give him an absolute property in it, but is only deposited as a pledge to secure a debt due to him, it remains in his hands, subject to the same equity as if it were in the hands of the original payee.—1 Bos & Pul. 398.

In Pennsylvania, by the construction given to a particular statute, the endorsee of a promissory note takes it, subject to all equities between the original parties, whether endorsed before or after it became due.—1 Dall. 441.

But, by a subsequent statute, it is provided, that notes bearing date in the *city or county of Philadelphia*, payable to the order of the payee, for value on account, or for value received, and in the body of which the words "without defalcation," or, "without set-off," are inserted, shall be held by the endorsees, discharged from any claim of defalcation or set-off by the drawer or endorsers thereof; and the endorsees shall be entitled to recover against the drawer and endorsers, such sums as, on the face of the notes, or by the endorsements thereon, appear to be due.—Act of 27th of Feb., 1797.

The case cited in 1 Dall. 441, "though never overruled, has always been regretted."—Per Tilghman, C. J., in 12 Serg. & R. 265; and see 8 Serg. & R. 483, and 9 Serg. & R. 196.

The consideration of a note payable "without defalcation," cannot be inquired into, by a *bona fide* holder, against the drawer, though the note be not dated in the city or county of *Philadelphia*, nor discounted by a bank, nor deposited in a bank for collection.—9 Serg. & R. 193.

A promissory note deposited for collection in one of the banks of Pennsylvania, incorporated by the act of 21st of March, 1814, and becoming due, but not being *drawn payable* at such bank, is, by the true construction of the eighth section of that act, not liable to defalcation.—8 Serg. & R. 481.

The author of this work has no hesitation in saying, that, at the present day, no defalcation would be allowed on any promissory note, negotiable according to the custom of merchants, in an action brought by a bona fide holder, without notice, against the maker.

In an action by the endorsee, against the first endorser, evidence is admissible to show that the note was endorsed for the accommodation of the drawer, by whom it was fraudulently put into circulation.—2 Browne, 262.

If the endorser of a promissory note prove that it was put into circulation by the drawer, by *falsehood* and *fraud*, he may call upon the plaintiff to show how he came by it, and what he gave for it.—5 Binn. 469.

The endorsee of a promissory note, assigned after a commission of bankruptcy has issued against the drawer, takes it subject to all the off-sets that existed at the time the debtor became bankrupt, although the note be dated in Philadelphia, and express to be payable "without defalcation."—1 Wash. C. C. R. 44.—4 Dall. 370.

Where a bill or note has been made payable to, or endorsed to, an unmarried woman, who afterwards marries, or where it is made during the coverture, the right of transfer rests in her husband, he being, by the marriage, entitled to all her personal property.—1 Str. 516.—3 Burr. 1776.

If a bill, &c., be made payable to a married woman, it is, in legal operation, payable to the husband, and an effectual endorsement must, in general, be in his name. —1 East, 432.—3 Esp. Rep. 266. S. C.

If a man become a bankrupt, all his property, in which he is beneficially interested, is vested, by the assignment of the commissioners, in the assignees, by relation to the act of bankruptcy, so as to defeat all intermediate acts done by him to dispose of his property and, consequently, the right of transfer of a bill or note, is in general vested in them, from the time of the act of bankruptcy.—Beawes, 469.—10 East. 418.—1 Campb. 279.

But it has been adjudged, that if a trader deliver a bill for a valuable consideration to another, previously to an act of bankruptcy, and forget to endorse it, he may endorse it after his bankruptcy.—Peake's Cas. 50. —3 Term Rep. 411; and if he and his assignees refuse, they may be compelled to do so by petition to the chancellor.—13 Ves. J. 206.—Cullen, 190.—1 Atk. 124.

On the death of the holder, the right of transfer is vested in his executor or administrator. If the executor or administrator endorse the bill or note, he will be personally liable in case the bill should be dishonoured. —Chitty on Bills, 137.

There is no legal objection to the validity of a transfer of a bill made after the time appointed for the payment of it, provided it remain unpaid by any of the parties.—1 Ld. Raym. 575.—1 Show. 163.—7 Term Rep. 431.—1 Hen. Bla. 89.

But there is a material distinction between a transfer made *before* a bill is due, and one made *after* that time. In the first case, it is said that the transfer carries no suspicion on the face of it, and the assignee receives it on his own intrinsic credit; nor is he bound to inquire into any circumstances existing between the assignor and any of the previous parties to the bill, as he will not be affected by them.—3 Term Rep. 82. But when a transfer of a bill is made *after it is due*, whether by endorsement or mere delivery, it is settled, that at least it is to be left to the jury, upon the slightest circumstance, to presume that the endorsee was acquainted with the fraud, or had notice of the circumstances which would have affected the validity of the bill, had it been in the hands of the person who was holder thereof at the time it became due.—3 Term Rep. 80.—1 Bos. & Pul. 399.—Campb. Ni. Pri. 19.

The endorsement of a note after it is due, throws a degree of suspicion upon it, and in an action against the maker by the endorsee, the former is in such case entitled to go into evidence, to show that the note has been paid, as between him and the endorser.—1 Ld. Raym. 575.—3 Term Rep. 80.

If the holder of a bill, having commenced an action upon it, afterwards deposits it in the hands of a creditor, the latter cannot also support another action, while the first is subsisting.—1 Taunt. 109.

An endorsement cannot in general be made *after payment*, so as to affect any of the parties except the person making such endorsement; and therefore, in an action on a bill at the suit of the endorsee against the acceptor, where it appeared that the drawer had paid the bill, and had afterwards endorsed it to the plaintiff, it was decided that such endorsement could not vest in the plaintiff any right of action against the acceptor; therefore, when an endorser or the drawer pays the bill, &c., the action against a prior endorser, or the acceptor, must be brought in the name of the party who

so paid the bill, or of a prior party.—Chitty on Bills, 144.

A negotiable note once paid, ceases to be negotiable; but, if an endorser pay it, he, or his assignee, in his name, may maintain an action upon it, against any of the prior parties.—8 Mass. Rep. 465.—3 Mass. Rep. 556.—5 Mass. Rep. 509.—11 Johns. Rep. 128.

An endorsement may be made on a blank note, before the insertion of any date or sum of money; in which case, the endorser is liable for any sum, at any time of payment that may afterwards be inserted; and it is immaterial whether the person taking the note on the credit of the endorsement, knew whether it was made before the drawing of the note, or not; for, in such a case, the endorsement is equivalent to a letter of credit for any indefinite sum.—Doug. 514.—2 Wash. Rep. 164.

Where a note is received, not in payment of a debt, but as a conditional payment only, it does not extinguish the original contract: there is no necessity, therefore, to prove an offer to return the note, before the institution of a suit on the original contract.—1 Cranch, 181.

Where a note, transferred as collateral security, is returned by the endorsee to the endorser, and other notes received in exchange, it is not such a payment as destroys its negotiable quality.—12 Mass. Rep. 78.

A person not originally party to a bill, by paying it for the honour of the parties to it, acquires a right of action against all those parties; 1 Esp. Rep. 112; and after a payment of a part, a bill may be endorsed over for the residue.—Ld. Raym. 360.—Carth. 466.

The endorsement of a note to the maker, is an extinguishment of it, and it cannot be revived by his endorsing it to a third person, or to the original payee. But such endorsement might create a new obligation in the endorser.—1 Litt. 290.

Endorsements are made either in *blank*, in *full*, or *restrictive;* which modes of transfer are different in their effect.

An endorsement in *blank*, is by far the most common, and is made by the mere writing of the endorser's name on the back of the bill, without any mention of the name of the person in whose favour the endorsement is made.—Doug. 683.—6 East, 21.

A blank endorsement makes a bill transferrable by the endorsee by mere delivery;—Douglas, 633; and its negotiability by that method cannot be restrained by any subsequent endorsement in full; because a holder, by delivery, may consider himself as the endorsee of the payee, and strike out all the subsequent endorsements, whether special or not.—4 Esp. Rep. 210. —Peake's Cas. Ni. Pri. 225.—12 Mod. 345.

Such, being the effect of a first endorsement in blank, it has been observed, that it is advisable for the endorsee, in some cases, to fill it up, so as to make it an endorsement in full, in order to avoid the risk which he may run, in case the bill be lost, of its getting into the hands of a bona fide holder.—Beawes, pl. 178.

An endorsement in blank, by A. on a note made payable to B. or bearer, does not make A. liable as an endorser, within the statute of Anne and the custom of merchants.—1 Nott & M'C. 128.

When bills, &c. are deposited in a banker's hands, and entered short in his books, or are in his possession, in case he becomes bankrupt his assignees will not be entitled thereto, though such deposit enables the banker to pass the interest to a third person, taking it bona fide for a valuable consideration.—2 Bla. Rep. 1156.—1 Bos. & Pul. 547.—9 East, 12.

An endorsement *in full*, is so called, because the endorser expresses therein in whose favour he makes the endorsement;—as, "pay the contents to A. B. or order," or to that effect. This endorsement contains in itself

a transfer of the interest in the bill to the person named in the endorsement.—Poth. pl. 22; and makes the bill transferrable in the first instance by the endorsement of A. B. only; though afterwards, if A. B. make a blank endorsement, it is transferrable by delivery, as well as by endorsement.—4 Term Rep. 48.—2 Camp. 211. —16 Ves. jun. 434.

A bill payable to a man's own order, is payable to himself, and he may bring an action thereon, averring that he made no order, &c.—Salk. 130.—5 East, 476.

After an endorsement of a note without recourse to the endorser, the note remains negotiable in the hands of the endorsee.—3 Mass. 225.

If the plaintiff be in possession of a note, as his own property, at the time of the commencement of the suit, the simple act of endorsing it may be done afterwards.—1 Caines' Rep. 269, 271.

A plaintiff is permitted to fill up a blank endorsement, or strike it out altogether, in court.—ibid, 271.

When a note is purchased after it is due, every presumption is to be made against the purchaser.—2 Caines' Cases, 303.

Therefore, if he state the purchase generally to have been in a certain year, and the maker has assigned his property under the insolvent act on the 16th day of January in that year, it will be presumed that the purchase was after the assignment.—ibid.

A note purchased after it is due, and after an assignment by the maker under the insolvent law, cannot, in an action by the assignees against the holder, be set off against a debt due to the insolvent estate.—ibid.

Cutting or dividing a bank note destroys its negotiability.—2 Nott & M'C. 464.

The payee or endorsee having the absolute property in the bill, and the right of disposing thereof, has the power of limiting the payment to whom he pleases;

—Burr. 1218; and consequently he may make a *restrictive* endorsement. Thus, he may stop the currency of the bill, by giving a bare authority to receive the money, as by an endorsement requesting the drawee to "pay to A. for my use," or, "to J. S. only;" which modes prevent a blank endorsement from being filled up by the endorsee, so as to convey any interest in the bill to himself, and from making a transfer of the bill, &c. and, as it is said, is revocable in its nature, like a power of attorney.—Chitty on Bills, 151.

It is here necessary to observe, that, although an endorsement may be made in blank, in full, or restrictive, it cannot, after acceptance, be made for less than the full sum appearing to be due upon the bill, &c. transferred.—Ld. Raym. 360.—Carth. 466.—1 Salk. 65. S. C.

As to the endorsing of bills, a difference has been taken between a bill payable to J. S. *or bearer*, and J. S. *or order;* the first is not assignable by the contract, so as to enable the endorsee to bring an action if the drawer refuse to pay; because there is no such authority given to the party by the first contract, and the effect of it is only to discharge the drawee, if he pays it to the bearer, though he comes to it by finding, theft, or otherwise; but, when the bill is payable to J. S. "or order," there an express power is given to the party to assign, and the endorsee may maintain an action.—Salk. 125.—Comb. 204, 466.

To make bills or notes assignable, the power to assign them must appear in the instruments themselves; therefore, where a bill of exchange was made payable to A. without the words, "or order," and endorsed to B. after acceptance, it was held that the endorsee could not maintain an action against the acceptors in his own name.—1 Dall. 194.

In all cases of a transfer of a bill drawn in sets, each part should be delivered to the person in whose favour the transfer is made.—Bayl. 15, 41.

If, after acceptance, the acceptor should improperly

detain the bill in his hands, the drawer [or holder] may nevertheless sue him on it, and give him notice to produce the bill, and, in default of production, give parol evidence of its contents.—7 Term Rep. 596.—5 East, 476.—2 Smith's Rep. 443. S. C.

A transfer by endorsement vests in the endorsee a right of action against all the precedent parties whose names are on the bill; and, after the bill has been duly endorsed by the payee in blank, it is transferrable by mere delivery, and the holder may sue all the parties to the bill: but, unless the payee or drawee, when the bill was payable to his order, has first endorsed it, a party who becomes possessed of it, can sue only the person from whom he obtained it.—Chitty on Bills, 155.

If A., the payee of a bill of exchange, endorse it in blank, and deliver it to B., and B. write above A's endorsement, "pay the contents to C", B. is not liable to C. as an endorser of the bill, and Lord Ellenborough declared that this was not an endorsement of the bill by the defendant. For such purpose, the name of the party must appear written with intent to endorse.—1 Camp. 442.

A. drew a note in favour of B., and, after signing it, put it into his desk. B. in the absence of A. prevailed upon A's wife to unlock the desk, and deliver the note to him. It was adjudged, that the mere signing of the note, without a delivery by the drawer to the payee, gave it no effect; and that the plaintiff could not take advantage of a possession surreptitiously obtained by him.—4 Dall. 58.

A transfer by *delivery*, without any endorsement, when made on account of a pre-existing debt, or for a valuable consideration passing to the assignor at the time of the assignment, as where goods are sold to him, imposes an obligation on the person making it, to the person in whose favour it is made, similar to that of a transfer by endorsement.—Chitty on Bills, 157. It is now settled, that in such case, unless it was expressly

agreed at the time of the transfer, that the assignee should take the instrument assigned, as payment, and run the risk of its being paid, he may, in case of default of payment by the drawee, maintain an action against the assignor, on the consideration of the transfer.—7 Term Rep. 65.—Holt, 121.

Where a debtor, in payment of goods, gives an order to pay the bearer the amount in bills on London, and the party takes bills for the amount, he will not, unless guilty of laches, discharge the original debtor.—6 Term Rep. 142.—1 Esp. Rep. 106.

But, as on a transfer by delivery, the assignor's name is not on the instrument, there is no privity of contract between him and any assignee, becoming such after the assignment by himself; and consequently, no person except his immediate assignee can maintain an action against him, and that only on the original consideration, and not on the bill itself.—Ld. Raym. 928.—2 Scho. & Lefroy, 112.

When a transfer by delivery, without endorsement, is made merely by way of *sale* of the bill, as sometimes occurs, the purchaser has no right of action whatever against the assignor, in case the bill is returned unpaid. —Chitty on Bills, 159.

But if a man assign a bill for any sufficient consideration, knowing it to be of no value, and the assignee be not aware of the fact, the former would, in all cases, be compellable to repay the money which he had received.—ibid.

It has been decided, that where the party discounting a bill, desired the holder not to endorse it, because he thought that the bill would have as good credit without it, and the bill was afterwards dishonoured, the latter was not liable.—3 Ves. jun. 368.—1 Ld. Raym. 442.

It seems, by the decisions in Massachusetts, that where a negotiable note is given for a subsisting debt,

the legal presumption is that the note was received in payment; and, unless this presumption be controlled, must operate as a discharge of the simple contract.—6 Mass. Rep. 143.—11 ibid. 359.

But, if a note not negotiable be given in consideration of a debt due on simple contract, the same presumption does not arise, and the creditor may have his remedy on the note, or may recover on the original contract.—ibid.

If a party endorse a bill for the accommodation of the drawer, which is also accepted by a third person for the like accommodation, such endorser may, after he has been compelled to pay the bill, support an action thereon against the acceptor.—3 East, 177; and such accommodation endorser, in case there may be reasonable ground to apprehend the insolvency of his principal, has an equitable right to withhold the payment of any money which he may owe to him, until he has been indemnified against any liability on account of his endorsement, though such liability would be no defence at law to an action by the principal.—Chitty on Bills, 161.

The defendants left their names endorsed in blank, with their clerk, for a particular purpose, which a third person, by false pretences, obtained from the clerk, and made a note, signing his own name as promissor, and then applied the note to a purpose different from that intended and specified by the endorsers. The endorsers were held liable to an innocent endorsee. This cannot be considered a forgery; the endorsers originally designing that a note of a certain description, and for a certain purpose, should be written on the paper, and the restriction being known only to the clerk. The confidence was reposed by the endorsers, who, though innocent, must be liable for the injury which arises from a breach of that confidence.—4 Mass. Rep. 45.

If one of the partners of a firm, has been in the

practice of endorsing the name of the firm on bills of exchange, as security, it is a fact from which the jury may legally infer that he had authority from the other partners; and the bona fide holder of such bill may recover against all the partners, notwithstanding the endorsement of the name of the firm was expressly prohibited in the articles of partnership.—2 Litt. 45.

SECTION XII.

Liability of the endorser.

In an action by the endorsee against the endorser of a foreign bill of exchange, the defendant is liable for damages, according to the law of the place where the bill was endorsed.—6 Cranch, 221.

The endorsement is a new and substantive contract.—ibid.

By the statute of Maryland, of 1763, ch. 23, which is perhaps only declaratory of the common law, an endorser may tender to a plaintiff the amount of a judgment which he has recovered against the maker of a note, and obtain an assignment of it.—3 Wheat. 520.

Though a note be void against the maker, it may be good against an endorser, in favour of the endorsee, who took it relying upon the endorsement.—3 Day, 3.

The contract made by an endorsement, extends to all the subsequent endorsers, even though the note was not originally negotiable.—ibid. 12.

It is not incumbent on the endorser, to show the holder where the maker is to be found.—4 Serg. & R. 480.

Where the drawer of a note is discharged from arrest on a *ca. sa.* (that is, where he has been taken in execution) by the holder, the endorser is also discharged.—4 Dall. 275.—3 Yeates, 496.

The endorser of a note is not discharged, by the

holder taking a mortgage from the drawer, as a security for the debt.—7 S. & R. 219.

An action for contribution cannot be maintained by the first endorser of an accommodation note, against the second endorser, on the ground of the first endorser having paid the whole to the bank, and the drawer being insolvent.—2 Litt. 174.

A., having accepted two bills of exchange for nearly the same amount, on the same day, sent his clerk to the person in whose hands both bills were, as agent of two different holders, to take up one of them; but the clerk took up the other, and brought it to A., who cancelled his acceptance. Within five minutes, however, after he had received the bill, he wrote his name again under the acceptance, and sent it back to the agent, who received it, and gave up the other bill. Held, that the bill first taken up was paid, and the endorsers discharged.—6 S. & R. 361. [Gibson, J., dissenting.]

The endorsement of a sealed note, in blank, by the payee, does not create a liability on the part of the endorser.—13 S. & R. 311.

A note drawn by A., payable to the order of B., and purporting to be endorsed by B., is discounted by C., who sells it bona fide, and without any improper conduct, by delivery, and without endorsement, to D., and receives the money. The endorsement of B. proves to be a forgery. D. may recover back the money paid to C.—3 Yeates, 531.

But, D. cannot maintain such suit, without having re-delivered or tendered the note to the defendant, before bringing the action.—ibid. 543.

If the payee of a note, payable to him or bearer, puts his name on the back, he may be sued as an endorser, in the same manner as if it were payable to his order.—3 Johns. Rep. 439.

In the transfer of every negotiable instrument, there

is an implied warranty that it is not forged.—15 Johns. Rep. 240.

An endorser, though in the nature of a surety, is answerable upon an independent contract, and it is his duty to take up the bill or note when dishonoured:—he is not, therefore, discharged from his liability by requesting the holder to sue the maker, and the holder's neglecting to do so till the maker becomes insolvent.—16 Johns. Rep. 162.

SECTION XIII.

Consequences of the loss of a bill, &c., and what conduct the holder should, in that case, pursue.

If the holder of a foreign or inland bill of exchange, check, &c., transferrable by *mere delivery*, lose or be robbed of it while in his possession, and it get into the hands of a person who was not aware of the loss, for a sufficient consideration, *previously to its being due*, such person, notwithstanding he derived his interest in the bill, &c., from the person who found or stole it, may maintain an action against the acceptor, or other parties; and the original holder, who lost it, will consequently forfeit all right of action; for it may be laid down, as a general principle, that whenever one of two innocent persons must suffer by the act of a third, he who has been the cause of the loss to such third person, must sustain it; and if a person who has not given a consideration for a lost or stolen bill, transferrable by mere delivery, present it to the drawee at the time it is due, and he pay it before he has notice of the loss or robbery, such drawee will not, in general, be liable to pay it over again to the real owner.—Chitty on Bills, 161, 162.

But, where a banker paid a check, the day before it bore date, which check had been lost by the payee, it was held that he was liable to pay the amount to the loser, it being proved to be contrary to the usual course

of business, to pay drafts before the day on which they are dated.—Sel. Cas. 238.

When a bill is assignable only by *endorsement*, as no interest in it can be conveyed otherwise than by that act, a person getting possession of it by a forged endorsement, will not acquire any interest in it, although he was not aware of the forgery; and consequently the original holder may, when he has regained possession of the bill, recover against the acceptor and drawer, although the acceptor may have paid the bill; and, if the person attempting to derive an intesest under such endorsement, sue the acceptor, he will be admitted to prove that the endorsement was not made by the person entitled to make it.—3 Term Rep. 127.—4 ibid. 28.—1 Hen. Bla. 607.

If the bona fide owner of a bank note, cut it into two parts, and send the parts in different letters, and one of them be stolen or lost, he may recover the whole amount from the bank, on producing the other. —2 W. C. C. R. 172.—Martin v. B. of U. States, C. C. Nov. 1821, M. S.

A notice by the bank, that notes voluntarily cut by the owner, would not be paid unless all the parts should be brought together, does not alter the law, although the notice were seen by the party by whom the notes were cut.—Martin v. B. of U. S. as above.

It is settled, that no action can be supported against the post-master-general, for the loss of bills out of letters put into the post-office.—1 Salk. 17.—Cowp. 754; and no person should refuse to pay a bill which he has accepted, to the loser, on the ground of its having been lost, if he has sufficient security and indemnification offered to him.—Vin. Ab. tit. Bills, R.

In France, as long ago as the beginning of the last century, the drawer of a bill was compellable to give the holder of it another of the same tenor, in case he lost the original bill; but neither in England nor in the United States, does such general rule obtain, in the

case of *inland* bills. There is, however, a proviso in the statute of 9 & 10 W. III. by which it is enacted, "That in case any *such* inland bill shall happen to be lost or miscarried, within the time before limited for the payment of the same," then the drawer of the said bill is, and shall be obliged to give another bill of the same tenor with that first given; the person to whom they are delivered giving security, if demanded, to the drawer, to indemnify him against all persons whatsoever, in case the said bills so alleged to be lost or miscarried, shall be found again.

It seems, that from the words *such*, the statute does not extend to *all* bills of exchange, but only to the particular bills therein mentioned; namely, such as are expressed to be for value received, and payable after date;—1 Ves. sen. 346.—4 Term Rep. 170.—2 Camp. 215; but it has been observed, that the equity of the statute would comprehend endorsements also, and that the 3 & 4 Ann. c. 9, which gives the like remedies upon notes, as were then in use on inland bills, would extend the statute of William to notes.—Bayl. 36.—2 Camp. 215.

It is perfectly clear, that, in case of the loss of a bill, &c. whether before or after it was due, or when it is payable on demand, and might by possibility be in the hands of a bona fide holder, a court of equity has jurisdiction to enforce payment of the amount, upon a sufficient indemnity being given, but not if it were not negotiable; and if such indemnity has been tendered, the defendant will, in general, have to pay the costs in equity.—Chitty on Bills, 166.

When the defendant himself wrongfully withholds the bill or note, it is clear that he may be sued at law. —5 East, 477.—2 Campb, 212.—6 Esp. 126. S. C.

It is said, that if one part of a *foreign* bill of exchange, drawn in sets, be lost by the *drawee*, or be, by his mistake, given to a wrong person; or if, by any other means the holder cannot have a return of the

bill, either accepted or not accepted, the drawee must give to the holder, or to his order, a promissory note for payment of the amount of the bill on the day it becomes due, on delivery of the second part if it arrive in time, or if not, upon the note; and if the acceptor refuse to give the note, the holder must immediately protest for non-acceptance, and when due must demand the money, though he have neither note nor bill; and, if payment be refused, a protest must be regularly made for non-payment,—Beawés, pl. 188.—Bul. Nisi Pri. 271.

In all cases, if a bill of exchange be lost, and a new bill cannot be had from the drawer, a protest may be made on a copy.—1 Show. 163.

Where a creditor directs his debtor to remit to him, by post, the money due to him by a bill of exchange, cash, note, &c.; or where it is the usual way of paying such debt, if the bill be lost, the debtor will be discharged.—Peake, 67.—*The author of this work questions the soundness of this doctrine.*

But, where the defendant, in discharge of a debt which he owed to the plaintiff, delivered a letter, containing the bills which were afterwards lost, to a bellman in the street, it was decided, that he was not discharged from liability to pay the debt, because it was incumbent on him to deliver the letter at the General Post-Office, or at least at a receiving house appointed by that office.—Peake, 186.—7 East, 385.

SECTION XIV.

Of presentment for acceptance.

On delivery of a bill of exchange to the payee, or to any other person who becomes holder by transfer, it is in some cases necessary, and in all advisable, to present it for acceptance. On such presentment, the drawee either complies with the drawer's request by accepting the bill, or refuses to do so: in which latter

case, it is, in general, incumbent on the holder to give notice to the various persons who became parties to the bill antecedently to himself; after which, any person not originally a party, may accept it *supra protest*, for the honour of the drawer or endorsers; and in some cases, also, the holder, it is said, may protest a bill for better security.

When a bill is drawn within a specified time *after sight*, it is necessary, in order to fix the period when it is to be paid, to present it to the drawee for acceptance; 2 Hen. Bla. 565; but in other cases, it is not incumbent on the holder to present the bill before it is due.—1 Term Rep. 713.—Burr. 2670. Com. Dig. tit. Merchant, F. 6. It is, however, certainly most advisable, in all cases, to endeavour to get the bill accepted; Poth. pl. 143.—1 East, 98; as, by that means, the holder obtains the additional security of the drawee, and the bill consequently becomes more negotiable.—Beawes, pl. 266.

It is said, that it is incumbent on the bearer of a bill, when he is only the mere agent of the person entitled to it, and on the payee, when he is directed by the drawer to do so, to present it for acceptance as soon as possible; because, it is only by acceptance that the person on whom the bill is drawn becomes debtor, and responsible to the holder; and if the affairs of the drawer should be deranged, an agent who has neglected to present the bill for acceptance, might be answerable, in damages and interest, to the person who employed him.—Poth. pl. 128.—Mar. pl. 46.

In cases where it would otherwise be necessary to present a bill for acceptance, the holder may, as will be seen hereafter, excuse his neglect to do so, by proving that the drawer or other person insisting on the want of it, as a defence, had no effects in the hands of the drawee, or had given no consideration for the bill. —2 Hen. Bla. 336, et post.

With respect to the time when bills payable *after*

sight, should be presented for acceptance, it was observed, in a late case, 2 Hen. Bla. 569. that the only rule which can be applied to bills of exchange, whether foreign or inland, and whether payable at sight, or at so many days after sight, or in any other manner, is, that due diligence must be used; and, as the drawer may sustain a loss by the holder's keeping it any great length of time, it is advisable, in all cases, to present it as soon as possible.—Poth. pl. 143.—Bayl. 60.

What is reasonable time, must depend on the particular circumstances of the case; and it must always be for the jury to determine, whether any laches are imputable to the plaintiff.—2 Hen. Bla. 569.

Presentment should, in all cases, be made during the usual hours of business; 7 East, 385; but a neglect to make a presentment at a proper time, may be excused by the circumstance of war having been declared, or by other reasonable cause or accident, not attributable to the misconduct of the holder.—2 Smith's Rep. 223.

It is said, that, in strictness, the drawee ought to accept the bill immediately on presentment, or refuse to do so; Com. Dig. tit. Merchant, F. P.; as, however, it is but reasonable that the drawee should have an opportunity, before he determine whether he will accept or not, of seeing whether he has effects of the drawer's in his hands, the payee or holder usually leaves the bill with him until the next day—at the farthest, twenty-four hours after the presentment—unless, in the interim he either accepts, or declares a determination not to accept.—2 Smith's Rep. 243.—Bayl. 62.

The author of this work, however, feels no hesitation in saying, from his own actual knowledge of the custom of merchants, that an answer to the question whether the bill will be accepted or not by the drawee, may be demanded, and required, at the very instant when the bill is presented for acceptance; and, if an answer be withheld, a notary may forthwith present it, and protest it for non-acceptance.

He further knows it to be law, that a promise to accept, given by any person in the counting-house or dwelling-house of the drawee, such person being employed in the business department of the drawee, will be binding as an acceptance.

If the drawee of a bill cannot be found at the place where the bill states him to reside, and it appear that he never lived there, or has absconded, the bill is considered as dishonoured;—Ld. Raym. 743; but, if he have only removed, it is incumbent on the holder to endeavour to find out to what place he has removed, and to make the presentment there.—Stra. 1087. —Bayl. 58; and he should, in all cases, make diligent inquiry after the drawee, and if it be in his power present the bill to him.—2 Esp. Rep. 511.

If, on presentment, it appear that the drawee is dead, the holder should inquire after his personal representative, and, if he live within a reasonable distance, should present the bill to him.—Molloy, b. 2. c. 10. s. 84. Poth. pl. 146.

If, on a bill being presented for acceptance, the drawee alter it as to the time of payment, and accept it so altered, he thereby vacates the bill as against the drawer and endorsers, and he is liable to a special action on the case, unless the holder acquiesce.—1 Taunt. 420.

If, however, the holder object to the alteration, and the bill be legible in its original state, the drawer and endorsers might not be discharged, and the holder might treat the bill as refused acceptance.—6 East, 309.

SECTION XV.

What constitutes a valid acceptance.

When the holder of a foreign or inland bill presents it for acceptance, he is entitled to insist on such an acceptance by the drawee as will subject him, at all events, to the payment of the bill according to its tenor;

and consequently such drawee must have capacity to contract, and to bind himself to pay the amount of the bill, otherwise the holder may treat it as dishonoured. —Bayl. 52.

An acceptance may, as has been already observed in a preceding chapter, be made by an agent; but in such case, it will be incumbent on the agent, if required, to produce his authority to the holder, as, if he do not, the holder may consider the bill as dishonoured, and act accordingly.—Beawes, pl. 87; and it has been doubted whether the holder is, in any case, bound to acquiesce in an acceptance by an agent, as it multiplies the proof, which he will be obliged to adduce, should he be compelled to bring an action on the bill.—1 Esp. Rep. 115, 269.

If the wife, friend, servant, or any other person has usually accepted bills for the drawee, in his absence, and he has approved thereof at his return, on proof of this, it would always be construed as his intention, and be as valid and binding as a legal and formal instrument.—Beawes, Lex. Mer. 426.

If the holder find that the drawee is an infant, *feme covert* (a married woman) or otherwise incapable of contracting, he may treat the bill as dishonoured. —Chitty on Bills, 183.

Bills of exchange may be drawn, accepted, or endorsed, by means of the agent or attorney in fact of the party.—1 Inst. 52. a.

An agent or attorney for this purpose, may be constituted by parol.—12 Mod. 564; and in such case, the principal is said to draw, accept, or endorse, by procuration.

Agents should be cautious how they accept bills directed to them personally, and not to their principals, although such direction describe them in their official characters; for, in such case, if they accept in their own name, they will become personally responsible. —Str. 955.—Ca. Temp. Hardw. S. C..

The clerk of a partnership firm may sign notes, accept bills, &c. in consequence of a special authority given by one partner, for each has full power to this effect.

A special authority must be strictly pursued. If an agent be authorised to sign a note payable at six months, and he sign a note payable at a shorter time, the principal is not bound.—2 Johns. Rep. 48; and, if an agent act beyond his authority, he will be responsible personally to third persons:—therefore, if he sign a note for his principal without his authority, he will be personally bound.—3 Johns. Cas. 70.

As to public agents, a distinction has long been recognized in their favour; and therefore, if an agent of the government contract for its benefit, and on its behalf, and describe himself as such in the contract, he is held not to be personally responsible, although the terms of the contract might, in cases of a mere private nature, involve him in a personal responsibility.—1 Selw. N. P. 229.

If a bill of exchange be drawn upon a firm, and one of the partners accept it in his own name, this acceptance binds the partnership.—1 Camp. N. P. C. 384.

If, after the dissolution of the partnership, one partner issue notes in the partnership name, and the notes are ante-dated, so as to appear as if they were dated within the term of the partnership, the other partners are not bound. Nor can one of the partners, after a dissolution, endorse notes or bills given before to the firm, though he is authorized to settle the partnership concerns.—1 Selw. N. P. 230.

But this rule applies only in cases where the dissolution of the partnership has been duly notified.—ibid.

If a bill be drawn on two, not being partners, and it be accepted only by one, it should be protested.—Holt, 297.—Beawes, pl. 228.

The very term *acceptance* seems to suppose a pre-

existing bill, and it appears now questionable, whether, in any case, an acceptance can be made before the bill is drawn; for, though in Pillans v. Van Microp,—Burr. 1663; it was held that a promise by the defendant, "to accept such bills as the plaintiff should, in about a month's time, draw upon the defendant, upon the credit of a third person," (for whose accommodation the plaintiff had already accepted bills) amounted to an acceptance; yet Lord Mansfield, afterwards, in the case of Pierson v. Dunlop.—Cowp. 573; qualified the doctrine laid down in the above case, and observed, that, "a promise to accept such a bill, did not amount to an acceptance, unless accompanied by circumstances which might induce a *third* person to take the bill by endorsement;" and Lord Kenyon, in Johnson v. Collings,—1 East, 105; observed, that "he thought that the admitting of a promise to accept, before the existence of the bill, to operate as an actual acceptance of it afterwards, even with the qualification last mentioned, was carrying the doctrine of implied acceptances to the utmost verge of the law; and he doubted whether it did not go beyond the proper boundary."

In conformity with this opinion, it has therefore been decided, that, where a person has, for a sufficient consideration, engaged in writing, or, in some cases, even verbally, to accept a bill *thereafter* to be drawn, such promise will not be *negotiable;* and the action for the breach thereof must be brought in the name of the person to whom the promise was made, and the declaration should be special, founded on the agreement.

It has been determined in the Supreme Court of the U. S. that a letter, written within a reasonable time before or after the date of a bill of exchange, describing it in intelligible terms, and promising to accept it, if shown to a person, who afterwards takes the bill on the credit of the letter, is a virtual acceptance, binding on the promissor.—2 Wheat. Rep. 66. S. C.

An acceptance, being an absolute undertaking to pay,

may be made even *after* the time appointed by the bill for the payment.—5 East, 514; and even after a prior refusal to accept.—ibid. 521; so as to bind the acceptor, though it would discharge the drawer and endorsers, unless due notice of non-acceptance, or of non-payment at the time the bill became due, were given, —12 Mod. 410; and in such case, the acceptor would be liable to pay the bill on demand.—Ld. Raym. 364. —Comyn, 75.

If a person draw a bill of exchange upon another, and deliver it to the payee for a sufficient consideration, and the drawer then die, this being an appropriation of a particular fund for the benefit of the payee, it seems that the death would be no revocation of the request to accept, and that the drawee may accept and pay.—2 Ves. jun. 115.—2 East, 227.

The holder may, in all cases, insist upon an absolute acceptance in writing, on the face of the bill, according to the terms of the bill, and, in default thereof, may consider the bill as dishonoured.—Poth. pl. 47. —3 & 4 Anne, c. 9. s. 50; and therefore, in a late case, in an action on the bill, against the drawer of a bill drawn on Lisbon, "payable in *effective*, and *not in val reals*," and the drawee had offered to accept it, payable in *val denaros*, another sort of currency, which was refused, Lord Ellenborough said, "The plaintiff had a right to refuse this acceptance. The drawee of a bill has no right to vary the acceptance from the terms of the bill, unless they be unambiguously and unequivocally the same.—1 Camp. 425.

So, in Parker v. Gordon,—7 East, 385; Mr. Justice Lawrence, said, "The holder of a bill may refuse to take a special acceptance payable at a banker's, but if he choose to take it, he must comply with the terms of it, and present it there in the usual banking hours, or he will discharge the drawer and endorsers."

It is clearly established, that a valid acceptance may be in writing, on the *bill itself*, or on *another paper*, as

by a letter, undertaking to ac[illegible] —4 East, 71.—[illegible] accept bills already drawn. on [illegible] case, an ac[illegible] Ves. 9; or it may be *verbal*.—Chitty is dr[illegible] Bills, 189.

In Clarke and others v. Cock,—4 East, 57; where A., in consideration of having commissioned B. to receive certain African bills payable to him, drew a bill upon B. for the amount, payable to his own order, and B. acknowledged, by letter, the receipt of the list of the African bills, and that A. had drawn for the amount, and assured him that it would meet due honour from him; this was held an acceptance of the bill by B.; and the purport of such letter having been communicated by A. to third persons, who, on the credit of it, advanced money on the bill to A., who endorsed it to them, it was also held, that B. was liable, as acceptor, to an action by such endorsees, although, after the endorsement, in consequence of the African bills having been attached in the hands of B., who was ignorant of his letter having been shown, A. wrote to B., advising him not to accept the bill, when tendered to him, which, as between A. and B., would have been a discharge of B's acceptance, if the bill had still remained in A's. hands;—and in Wynne et al. v. Rackes et al., (5 East, 514) it was held, that a letter from the drawees of a bill in England, to the drawer in America, stating, that "their prospect of security being so much improved, they should accept or certainly pay the bill," is an acceptance in law, although the drawees had before refused to accept the bill, when presented for acceptance by the holder, who resided in England, and again, after the writing of such letter, refused payment of it, when presented for payment, and although such letter, written before, was not received by the drawer in America, until *after* the bill became due.

But if a merchant be desired to accept a bill, on account of another, and to draw upon a third, in order to reimburse himself, and in consequence he draw a bill upon that third person; the bare act of drawing this bill, will not amount to an acceptance of the other;

for the party evidently shows that he meant to make himself liable, only in case the bill drawn by him, should be accepted and paid.—1 Term. Rep. 269.

Where a bill, payable after sight, is accepted, it is usual and proper also to write the day on which the acceptance is made.—Beawes, pl. 266.

An acceptance may also be *implied*, as well as expressed; and it is said, that it may be inferred from the *drawee's* keeping the bill a great length of time; 1 Atk. 611; or by any other act which gives credit to the bill, and induces the holder not to protest it; Bul. Ni. Pri. 270.—4 Esp. Rep. 226; or is intended as a surprise upon him, and to induce him to consider the bill as accepted.—Bayl. 48. n. a.

Where, in an action on a bill of exchange, it appeared that the plaintiff had transmitted the bill, by post, to the defendant, the drawee, desiring him to accept it, and hand it over to the plaintiff's agent in London, which was the usual mode of dealing between the parties; the plaintiff, hearing nothing of his bill from his agent, wrote to the defendant, remonstrating with him on account of his delay; and the defendant answered, that he had retained the bill, because he once thought of accepting it, but he now declined doing so; In this case, Lord Ellenborough said, "This is clearly an acceptance. If the bill be left for the express purpose of being accepted, and be retained by the drawee, this retention is as much an acceptance, as if he had written his name upon the face of it."—1 Campb. 425.

A verbal or written *promise* to accept, at a future period, a bill *already* drawn, or that a bill then drawn shall meet due honour; 4 East, 69; or shall be accepted, or certainly paid when due; 5 East, 514.—6 Vesey, jun. 9; amounts to an absolute acceptance; and a promise of the same nature, as, for instance, "leave the bill, and I will accept it;" Bul. Ni. Pri. 270;—will also amount to a complete and absolute acceptance, in the hands of a bonâ fide holder, although the

drawee had no consideration for the promise; Burr. 1669; but, as we have already seen, a promise to accept a non-existing bill, is not an acceptance.

If the drawee say, "Leave your bill with me, and I will accept it;" or, "Call for it to-morrow, and it shall be accepted;" these words, by the custom of merchants, as effectually bind, as if he had actually signed or subscribed his name in the usual manner.—Molloy, 280.

In all cases, if the promise to accept in future, be obtained from the drawee by any fraud or misrepresentation, it will not bind him, unless it be in the hands of a bona fide holder.—Burr. 1669.

If the drawee of a bill say that he cannot accept it without further direction from J. S., and J. S. afterwards desire him to accept, and to draw upon A. B. for the amount, the mere drawing upon A. B. will not amount to an absolute acceptance, nor can it become such, before the bill on A. B. is accepted; 1 Term Rep. 269; and in all cases where the undertaking is doubtful, the drawee will be at liberty to rebut the presumption in favour of an acceptance; as, where a bill was sent, by post, to the drawee for acceptance, and he entered it in his bill-book, wrote upon it the number of the entry, and kept it ten days, and on the tenth day minuted on it the day of the month, and returned it, saying he could not accept, it was adjudged that these circumstances did not constitute an acceptance, it being proved that it was the drawee's practice to enter all his bills, whether he meant to accept them or not.—1 Atk. 611.

If the drawee of a bill be desirous not entirely to dishonour it, he may make such an acceptance as will subject him to the payment of the money only on a contingency; in which case, the acceptance is called *conditional*.—Bayl. 44. n. c. This is permitted, though we have seen that the bill cannot be *drawn* payable on a contingency.—Willes, 398. n. d. et ante. The holder

is not bound to receive such an acceptance; but if he receive it, he should give immediate notice to the other parties to the bill, of the nature of the acceptance offered; by which means, they will not be discharged from liability to pay the bill, in case it should be returned for non-payment.

Where the drawee of a bill, in conversation with a third person, a stranger to the transaction, said, he "must pay," or "would have to pay it," of which remark it did not appear that the holder had heard; it was held, that this was not evidence of an acceptance, so as to charge the drawer.—2 Rep. Con. Ct. 132.

Any act which evinces an intention not to be bound, unless upon a certain event, is a conditional acceptance.—Bayl. 44. n. c. 49.

But what shall be considered as an absolute, or as a conditional acceptance, is a question of law, to be determined by the court, and is not to be left to the jury. —1 Term Rep. 182.

If the name of the drawer be forged, and the bill be accepted, and paid to an innocent endorsee for a valuable consideration, the acceptor cannot recover the money back from him.—3 Burr. 1354.

A *partial* acceptance *varies* from the tenor of the bill; as, where it is made to pay part of the sum for which the bill is drawn.—1 Stra. 214.—Poth. pl. 48; or to pay at a different time; Molloy, 283; or place, 11 Mod. 190.—Stra. 1194.

In case of an acceptance varying, in a material respect, from the tenor of the bill, the holder, if he intend to resort to the other parties to the bill, in default of payment, should immediately give notice to them of such conditional or partial acceptance, and should, if he mean to avail himself of the acceptance, express, in his notice, the nature of it; Mar. 68, 85.—1 Taunt. 422; for, any act whence it may be collected that the holder does not acquiesce in the acceptance, such as a

general notice of non-acceptance, will be a waiver of it.—1 Term Rep. 182.—6 East, 200.

The obligation of the acceptor is, in general, *irrevocable*.—Mar. 83.—Laws of Hamburgh, art 7. Thus, in Trimmer v. Oddy, tried before Lord Kenyon, July 12, 1800, G. H. London, and in Thornton v. Dick, (4 Esp. Rep. 270.) it was held, that if the drawee of a bill put his name upon it as acceptor, he cannot afterwards, even before it has been delivered to the payee, discharge his acceptance by erasing his name; and in a subsequent case, (6 East, 199.) under similar circumstances, Lord Ellenborough, C. J. observed, that "the rule is certainly laid down in the Hamburgh Ordinance, that an acceptance once made cannot be revoked; though, to be sure, that leaves the question open, as to what is an acceptance, whether it be perfected before the delivery of the bill;" and Mr. J. Lawrence observed, that "when the general question shall arise, it will be worth considering, how that which is not communicated to the holder, can be considered as an acceptance while it is yet in the hands of the drawee, and where he obliterates it before any communication made to the holder."

In Trimmer v. Oddy, Lord Kenyon said, "If the drawee deface the bill, he is liable as acceptor. About forty years ago, it was thought, that if a man wrote any thing upon a bill, he was to be bound as an acceptor; so that if a man had set down some sums of money, and cast them up on the back of the bill, that would amount to an acceptance. But this is a doctrine to which I cannot subscribe: but if a party put upon a bill that which essentially injures and defaces it, that makes him liable *as acceptor*. When the defendants had written an acceptance on the bill, they could not be allowed to strike it out again; the law gives no time to the party to change his mind, but if accepted by *mistake*, it might then be otherwise," and Lord Kenyon said he "inclined to think, that, in such case, the drawee would not be liable."

It has been decided, that if the holder of a bill of exchange agree not to sue the acceptor, on his making affidavit that the acceptance is a forgery, and such affidavit be accordingly made and sworn, he cannot afterwards bring an action on the bill, though the affidavit be false.—Peake, 1187.—1 Esp. Rep. 178.

But the author of this work takes the liberty of questioning the soundness of the above decision; it being a rule of law, running universally through every contract, that, if the condition be founded on fraud or misrepresentation, it is void, as between the parties. In that case, the agreement not to sue was made with the understanding that the affidavit would be *true*, and where it is clearly proved *false*, it is presumed that the original contract would thereby revive.

The doctrine is well established, that the acceptor is bound to know the hand-writing of the drawer, and cannot defend himself from payment by a subsequent discovery of the forgery.—10 Wheat. 333.

The drawee will be discharged from liability, in the case of an acceptance payable at a banker's, if it be not presented there, and he can prove that he has sustained damages in consequence of the holder's laches. —Stra. 1198.

But if the banker continue solvent, the holder is not bound to prove a demand on the banker, in an action against the acceptor.—Bac. Ab. 715.

An accommodation acceptor may be discharged by the holder's giving time to the drawer, after having notice that the bill was accepted for his accommodation; and Lord Ellenborough said, "This being an accommodation bill, within the knowledge of all the parties, the acceptor can be considered only as a surety for the drawer; and in the case of simple contracts, the surety is discharged by time being given to the principal without his concurrence. The defendant's remedy over is materially affected by the new agreement into which the plaintiff entered with the drawer

after the bill was due."—2 Campb. 185; sed vide 5. Esp. Rep. 178.

Where a person who has funds in his hands belonging to another, or is otherwise indebted to him, accepts a bill for his accommodation, and the drawer afterwards commits an act of bankruptcy, or becomes insolvent, such acceptor may retain the funds or debt until the bill becomes due, as an indemnity against his liability as acceptor.—7 Term Rep. 711.—1 Campb. 12.

SECTION XVI.

Of non-acceptance; and the conduct which the holder must thereupon pursue.

The inquiry into the conduct which the holder of a bill of exchange should pursue, on a neglect or refusal to accept at all, or on the offer of a conditional or partial acceptance, may be made under the following heads:

1. When notice is requisite.
2. The mode of giving notice.
3. The time when it must be given.
4. By whom, it must be given.
5. To whom, it should be given.
6. Of the liability of the parties on receiving notice.
7. Of the consequences of the holder's neglect to give notice, and how waived, &c.

1. *When notice of non-acceptance is necessary.*

If, in any case, a bill be presented, and an acceptance be refused, or only a conditional or partial acceptance be offered, notice should immediately be given to the persons to whom the holder means to resort for payment, or they will, in general, be totally discharged

from their respective liabilities.—2 Camp. 458.—7 East, 362.

A bona fide holder, to whom the bill is transferred, after refusal to accept, is affected by the neglect of any previous holder in giving notice of that fact.—2 Camp. 458.—12 East, 434. S. C.

This is required, in order that the anterior parties to the bill may respectively take the necessary measures to obtain payment from the parties respectively liable to them; and if notice be not given, it is a presumption of law, that the drawer and endorsers are injured by the omission; and it is on this principle, that notice of non-acceptance and non-payment is required.—2 Bos. & Pul. 280.—7 East, 362.

From some cases to be found in the books, it appears to have been formerly held, that it was incumbent on the person insisting on the want of notice, to prove that he had really sustained damage by the laches of the holder; but it has been settled, by later decisions, that such damage is to be presumed, and that the holder must, in excuse for the omission of giving notice, prove that the person insisting upon the want of notice, did not sustain any damage; or, at least, must adduce in evidence such facts as may afford an inference to that effect, and thereby throw the proof of actual damage on that person; for it is always presumed, that the drawer of a bill has effects in the drawee's hands, and that the endorser or assignor has given value for it, and consequently, that each may have sustained a loss by the holder's neglect to give notice, by which the chance of obtaining satisfaction from the parties liable to them, must necessarily be rendered more precarious.—Chitty on Bills, 214.

If an endorser of a bill of exchange have received from the drawer funds to discharge the bill, notice to the endorser of the non-acceptance of the bill is not necessary to charge him.—7 Mass. 449.

It is always, however, advisable to have a bill regu-

larly protested, if acceptance be refused, and to give notice to the parties interested.—1 Bos. & Pul. 654. —12 East, 175.

The death, bankruptcy, or known insolvency, of the drawee, or his being in prison, constitutes no excuse for the neglect to give due notice of non-acceptance or non-payment; not only for the reasons just stated, but also because many means may remain of obtaining payment by the assistance of friends or otherwise, of which it is reasonable that the drawer and endorsers should have the opportunity of availing themselves; neither will the circumstance of the drawee's having informed the drawer, before the bill was presented for acceptance or became due, that he could not honour it, be a sufficient excuse for not giving notice.—Chitty on Bills, 222, 223.

Where one of several drawers of a bill was also the acceptor, it was held, in an action against the drawers, that proof of these circumstances dispensed with the necessity of proving that notice of non-payment was, in fact, given.—1 Camp. 82.

Where both drawer and acceptor are fictitious persons, a bona fide endorser of a bill, without consideration, is entitled to notice.—4 Taunt. Rep. 731.

The holder of a bill of exchange is excused for not giving regular notice of its being dishonoured, to an endorser, of whose place of residence he is ignorant, if he use reasonable diligence to discover where the endorser may be found, which is a question of fact for a jury.—2 Camp. 461.—12 East. 433.

It is sufficient, when a promissory note has been dishonoured, to make inquiry at the drawer's for the residence of the payee.—Wightwick, 76.

Where the drawer has no funds in the hands of the drawee, neither protest nor notice is necessary; nor need the payee wait until the time of payment arrives,

or even protest the bill for acceptance, but may sue the drawer immediately.—1 Wash. C. C. R. 461.

The holder of a bill of exchange is also excused for not giving notice of its dishonour in the usual time, by the day on which he should regularly have given notice, being a public festival, on which he is strictly forbidden, by his religion, to attend to any secular affairs.—2 Camp. 602.

2. *The mode of giving notice of non-acceptance.*

If the drawee refuse to accept, the holder should cause the bill to be protested; for which purpose, he should carry the bill to a notary, who is to present it again to the drawee, and demand acceptance, which should be during the usual hours of business; and if the drawee again refuse to accept, the notary is thereupon to make a minute on the bill itself, consisting of his initials, the month, the day, and year, and the reason, if assigned, for non-acceptance, together with his charge. The next step is, for the notary to draw up the protest, which is a formal declaration on the bill itself, if it can be obtained, or otherwise on a copy, (1 Show. 164) that it has been presented for acceptance, which was refused, and why, and that the holder intends to recover all damages, expenses, &c., which he, or his principal, or any other party to the bill, may sustain on account of non-acceptance.—Poth. pl. 84.—Mar. 16.

In case there be not any public notary at the place where the bill is dishonoured, it may be protested by any substantial person of that place, in the presence of two or more witnesses.—2 Mar. 107.

If a conditional or partial acceptance be offered, the protest should not be general, as, if it be so, it will release the acceptor from the effect of such acceptance.

It is not necessary that a copy of the protest should accompany the notice of non-acceptance;—Bul. Ni. Pri. 271; nor is it necessary to send the protested bill;

but a notice of the dishonour of the bill, should, in all cases, be immediately given.—Chitty on Bills, 232.

But the Supreme Court of Massachusetts have held, that a copy of the protest should be given or offered to the drawer, or due diligence used to furnish him with it.—6 Mass. Rep. 386.

With respect to the mode of giving the notice, personal service is not necessary, and it will suffice to leave a written notice at the residence of the party; 4 Term Rep. 465; and it is sufficient, in the case both of a foreign and an inland bill, to send notice by the post, even though the letter should miscarry.—2 Hen. Bla. 509.—3 Esp. Rep. 54.

Where there is no post, it may be sufficient to send notice by the ordinary mode of conveyance, though notice by a special messenger might arrive earlier; 2 Hen. Bla. 465.—3 Bos. & Pul. 602; and it has recently been determined, (2 Smith's Rep. 404) that where it is necessary, or more convenient for the endorsee, to send notice by other conveyance than the post, to the endorser or drawer, of the non-payment of a bill of exchange, he is entitled to do so, and to charge for the same.

3. *The time when protest must be made, and notice given.*

Notice of the refusal to accept, should, in all cases, be given within a reasonable time. It should be given, at furthest, on the following day.—4 Term. Rep. 170.

The precise time when notice is to be given to an endorser, cannot be ascertained. The situation of the parties, and the means of communication, are always to be inquired into, for the purpose of determining whether the delay has been reasonable, or due diligence used in giving notice.

If the parties reside in the same town, notice should be given immediately after demand upon the maker.

It ought to be given on the same day.—12 Mass. Rep. 403.

The only rule which can be applied to all cases of bills of exchange, is, that due diligence must be used. Due diligence is the only thing to be considered, whether the bill be foreign or inland, or whether it be payable at, or so many days after sight, or in any other manner.—2 H. Bl. 569.

4. *By whom, notice must be given.*

It is advisable for each party, immediately on receipt of notice, to give a fresh notice to such of those parties who are liable over to him, and against whom he must prove notice; and the notice should be given by some agent or servant who will be competent to prove it, and not by the holder in person.

5. *To whom, notice must be given.*

If the party entitled to notice, be a bankrupt, notice should be given to him and his assignees: if the party be dead, notice should be given to his executor or administrator.

When the party entitled to notice is abroad, at the time of the dishonour, if he have a place of residence in England, it will be sufficient to leave notice of non-acceptance at that place; and a demand of acceptance or payment from his wife, or servant, would, in such case, be regular.—2 Esp. Rep. 511.—1 Bos. & Pul. 652.—sed vide 5 Esp. Rep. 175.

6. *Of the liability of the parties to a bill on non-acceptance.*

If the drawee, on presentment for acceptance, dishonour the bill, either wholly or partially, the holder may insist upon immediate payment by the parties liable to him, as well of the drawer as of the prior endorsers, or, in default thereof, may instantly commence an action against them.—Chitty on Bills, 244.

Where, however, acceptance or payment have been rendered illegal by the laws of the country, the drawer, &c., may not be liable to be sued on the bill.—3 Bos. & Pul. 340.

If the holder of a bill neglect to present it for acceptance when necessary, or to give notice of non-acceptance to those persons entitled to object to the want of it, such conduct, as has been already shown, discharges them from their respective liabilities.

A foreign bill of exchange was drawn payable at 120 days after sight, but when it was presented for acceptance, that was refused; upon which, an action was immediately brought against the drawer, without waiting until the expiration of the 120 days. On the trial, the defendant objected, that he was not liable until the expiration of the 120 days, and offered evidence to prove that the custom of merchants was such. But Lord Mansfield, C. J., said that the law was clearly otherwise, and refused to hear the evidence.—3 Bull. N. P. 269.—3 East, 483.

J. S. having drawn bills on Spain, which were afterwards protested for non-acceptance, became a bankrupt before they were returned, and, being arrested, he was discharged, on motion, on the ground that it was a debt contracted before the bankruptcy, and at the very instant when the bills were drawn.

7. *How the consequences of a neglect to give notice may be waived, or otherwise removed.*

The consequences of the neglect to give notice of non-acceptance, may be removed by some circumstances; as, by some act of the person entitled to object to the want of it, which amounts to a waiver of the advantage which the law has given to him; or, in case of a conditional acceptance, by the completion of those conditions, before the bill becomes payable. Thus, it has been decided, that a payment even of part, (1 Taunt. 12.) or a promise to pay the whole, or

to see it paid, or an acknowledgment that it must be paid, made by the person insisting on the want of notice, amounts to a waiver of the consequence of the laches of the holder, and admits his right of action.—Chitty on Bills, 248.

But the promise should amount to an admission of the holder's *right* to receive payment; and, therefore, where a foreigner said, "I am not acquainted with your laws,—if I am bound to pay it, I will," such promise was not considered as a waiver of the objection of want of notice.—3 Esp. Rep. 158.

If an endorser propose to the holder to pay the bill by instalments, and such offer be rejected, he is at liberty afterwards to avail himself of the want of notice.—1 Term Rep. 714.

So, it was decided, that, if the drawer or endorser, after being arrested, without acknowledging his liability, merely offers to give a bill, by way of compromise, for the sum demanded, this does not obviate the necessity of proving notice; and Lord Ellenborough, in that case, observed, "This offer is neither an acknowledgment nor a waiver to obviate the necessity of expressly proving notice of the dishonour of the bill. He might have offered to give his acceptance at one or two months, although being entitled to notice of the dishonour of the former bill, he had received none, and although, upon this compromise being refused, he meant to rely upon this objection. If the plaintiff accepted the offer, good and well; if not, things were to remain on the same footing as before it was made.—2 Camp. 106.

SECTION XVII.

Of protest for better security.

The custom of merchants is stated to be, that if the *drawee* of a bill of exchange abscond before the day when the bill is due, the holder may protest it, in order

to have better security for the payment, and should give notice to the drawer and endorsers of the absconding of the drawee.—Lord Raym. 743.—Kyd, 139; and, if the acceptor of a foreign bill become bankrupt before it is due, it seems that the holder may also, in such case, protest for better security.—5 Ves. jun. 574; but the acceptor is not, on account of the bankruptcy of the *drawer*, compellable to give this security.—Beawes, pl. 22.

The neglect to make this protest, will not affect the holder's remedy against the drawer and endorsers. —ibid. 23.

It may be collected, that, though the drawer or endorsers refuse to give better security, the holder must nevertheless wait till the bill be due, before he can sue either of those parties.—ibid. 26.

Any person may, without the consent of the drawer or endorsers, accept the bill, supra protest, for better security.—5 Ves. jun. 574. This security, it is said, is usually given by making another subscription under the protest, that the person who becomes new security, will be bound, as principal, for the payment of the sum mentioned in the bill upon which the protest is made. —Com. Dig. Merchant F. 8. cites Mar. 28.

Beawes, in his Lex Mercatoria, p. 417, says, "When any protest is received, either for want of acceptance, or better security, the person to whom it is sent, must presently repair with it to the drawer or endorser of the bill, and upon sight thereof, he must give a satisfactory security, if his own is not satisfactory, for repayment of the money received, with re-exchange and charges, if it is not paid when due; and it is customary, in such cases, to make a deposit suitable to the value, or to procure some person of unexceptionable credit to be bound for its punctual discharge."

SECTION XVIII.

Of acceptance supra protest.

When a foreign bill is protested for non-acceptance, or for better security, any person may *accept* it *supra protest*, which acceptance is so called from the manner in which it is made. This description of acceptance is frequently made in England, upon a foreign bill, for the purpose either of promoting the negotiation of the bill when the drawee's credit is suspected, or to save the reputation, and prevent a suit from being brought against some of the parties, where the drawee either cannot be found, is not capable of making a contract, or refuses to accept; and such acceptance is called an acceptance for the *honour* of the person on whose behalf it is made, and it accrues to the benefit of all who become parties subsequently to that person.—Lord Raym. 88.—Bayl. 45.

The drawee, though he may not choose to accept for the account of the drawer, may accept for the honour of the endorser; in which latter case, he should immediately send the protest on which he made the acceptance, to the endorser.—Beawes, pl. 33.—*sed quære*, ante.

When the drawee will not accept the bill, *any other person* may, after refusal by him.—Lord Raym. 88; and after protest, accept it for the honour of the bill, or of the drawer,—Mar. 125.—Carth. 129. S. C; or of any particular endorser.—2 Camp. 448; and even a bill previously accepted supra protest, may be accepted by another person supra protest, in honour of some particular person.—Beawes, pl. 42.

No one, however, should accept a bill under protest for non-acceptance for the honour of the drawer, before he has ascertained from the drawee his reason for suffering the bill to be protested; but, if the accept-

ance be in honour of the endorser, such inquiry is unnecessary.—ibid. 46.

It has been adjudged, that the holder of a bill is not *compellable*, in any case, to receive an acceptance supra protest.—12 Mod. 410.—3 Burr. 1672.

The method of accepting supra protest, is said to be as follows:—The acceptor must personally appear before a notary public with witnesses, and declare that he accepts such protested bill in honour of the drawer, or endorser, and that he will satisfy the same at the appointed time; and then he must subscribe the bill, with his own hand, thus: "Accepted supra protest, in honour of J. B."—or, as is more usual, "Accepts S. P."—Beawes, pl. 38.—Bayl. 48.

A general acceptance, supra protest, is considered as made for the honour of the drawer, unless otherwise expressed.—Bayl. 45; such acceptance, however, may be so worded, that, though it be intended for the honour of the drawer, yet it may equally bind the endorser; but in this case, notice of such acceptance must be sent to the latter.—Beawes, pl. 37.

The holder should always take care to have the bill protested for non-acceptance before the acceptance for honour is made; as otherwise, it is said, the drawer might allege that he did not draw on the person making the acceptance.—Mar. 88, 125.

If the acceptance were for the honour of the bill or of the drawer, the acceptor is liable to all the endorsers, as well as to the holder; if in honour of a particular endorser, then to all subsequent endorsees.

A person who accepts a bill supra protest, for the honour either of a drawer or of an endorser, although without his order or knowledge, has, it is said, his redress and remedy against such person, who must indemnify him from any damage he may have sustained, the same as if he had acted entirely by his direction.

—1 Term. Rep. 269; et vide post, of payment supra protest.

He who accepts a bill in honour of the drawer only, has no remedy against any of the endorsers, because he accepts merely on behalf of the drawer; but the acceptor for the honour of the drawer of a bill already accepted by the drawee, but protested by the holder for better security, may, when he has paid the bill, sue the drawer or drawee, though, in the case of a bankruptcy of these parties, if the first acceptance were for the accommodation of the drawer, a court of equity will compel the acceptor supra protest, first to resort to the drawer's estate.—5 Vesey, jun. 574.

An acceptor for the honour of an endorser, has no claim upon any party to the bill subsequent to him for whose honour he accepted: but the endorser for whose honour he accepted, and all the prior parties, the drawer included, are obliged to make satisfaction to the acceptor.—Beawes, pl. 49, 35, 44.—Poth. pl. 113.

One who has accepted a bill, supra protest, for the honour of the first endorser, has a right to impose as a condition upon which he will pay, that the holder will endorse it to him.—2 Wash. C. C. R. 485.

Where an acceptance is conditional, the plaintiff, before he can charge the acceptor, must show performance of the condition.—ibid.

SECTION XIX.

Of presentment of a bill, &c. for payment.

It would be extremely injurious to commerce, if the holder of a bill, &c. were suffered to give longer credit to the drawee, than the bill, &c. directs, and afterwards, in default of payment by such drawee, to resort to the drawer or endorsers, at a time when perhaps the accounts between them and the persons liable to them might be adjusted; for those persons might have become

insolvents, and the common law detests negligence and laches.—Chitty on Bills, 259.

On this principle, it is settled, that the holder of a bill must present it to the drawee, for payment, at the time when due, when a time of payment is specified; and when no time is expressed, within a reasonable period after receipt of the bill, &c. and that if he neglect to do so, he shall not afterwards resort to the drawer or endorsers, whose implied contracts are to pay only in default of the drawee, and who are always presumed to have sustained damage by the holder's laches.—ibid. 259, 260.

It has been held, that even the bankruptcy, insolvency, or death of the acceptor of a bill, or maker of a note, however notorious, will not excuse the neglect to make due presentment, but, that in the last case, it should be made to his personal representative, and in case there be no executor or administrator, then at the house of the deceased, otherwise the drawer and endorsers will be discharged.—8 East, 245.—11 East, 117.—1 Serg. & R. 334.

But if the endorser have accepted from the drawer an assignment of his estate, for the purpose, among other things, of indemnifying him against his endorsements, notice is not necessary.—1 Serg. & R. 334.

Where the maker of a note, which has been assigned to the holder as a *collateral security*, becomes insolvent before the note falls due, it is not necessary for the holder to give notice of the non-payment.—3 Wash. C. C. R. 206.

But if the amount of a note which has been lent to another, be lost, for want of due diligence to recover it, the borrower is liable.—1 Wash. C. C. R. 230.

If the maker of a note has shut up his house, it will not suffice merely to present it there, for the holder ought to inquire after him, and endeavour to find him out—2 Stra. 1087.

When a bill, transferrable only by endorsement, is delivered to a person without being endorsed, he should, nevertheless, present the bill for payment to the acceptor, and offer an indemnity to him; and, if the acceptor then refuse to pay, the bill should be protested for non-payment.—Chitty on Bills, 262.

The demand of payment of a *foreign* bill must be made by the notary public himself, and not by his clerk; and even in the case of an *inland* bill, it is doubtful, whether the demand, as the foundation of the protest, in consequence of the statute of W. III. can be made by the notary's clerk, or by any other person than the notary himself.—4 Term Rep. 170.

If A. lend the note of a third person to B., B. must use due diligence to recover it; and if it be lost by his want of diligence, he must be responsible.—1 Wash. C. C. R. 230.

A notary, on protesting a note or bill for non-payment, is not bound to give notice to the endorsers. If he promise the holder to give notice to the endorsers, so as to enable him to recover his money, and he give notice to the second endorser, but not to the first, and the holder afterwards recover the full amount from the second endorser, the notary is not liable, on that promise, to the second endorser, for not giving notice to the first endorser.—2 Johns. Rep. 204.

If a bill has been protested for non-acceptance, and due notice given to the antecedent parties, a protest and notice, in case of non-payment, are not necessary to charge the same parties; for their liability is complete on the non-acceptance.—5 Johns. Rep. 375.—3 Johns. Rep. 202.

Where a note is not payable at any particular place, and the maker has a known and permanent residence within the state, the holder is bound to make a demand of payment there, in order to charge the endorser.—14 Johns. Rep. 114.

Where a bill was drawn on a person at Liverpool, payable at London, and the bill was duly presented at Liverpool, and protested for non-acceptance, and afterwards protested for non-payment at Liverpool, where the drawee resided, it was held that the holder had a good cause of action against the drawer, on the protest for non-acceptance; that it is not necessary to set forth the protest for non-payment in the plaintiff's declaration, and, if done, it may be rejected as surplusage, on a demurrer; that the protest for non-payment at Liverpool was sufficient, as no place of payment was designated in London, and that the holder might, at his election, cause the bill to be protested for non-payment in London, or at the place where the drawee resided. —3 Johns. Rep. 202.

Where a bill was drawn on a person residing at Liverpool, payable in London, and, after being protested for non-acceptance at Liverpool, was protested at London for non-payment, and the declaration stated, "that the bill not being paid, and the holders not knowing where to present the same for payment in London, caused the same to be protested, &c.," it was held, that the protest for non-payment was sufficient, and, where no place of payment in London was specified in the bill, the holder was not bound to make any inquiry after the drawee there.—3 Johns. Rep. 207.

If no place be mentioned in a note, at which the money is to be paid, it seems that parol evidence is admissible to show at what place it was agreed that it should be paid.—4 Johns. Rep. 286.

It is not incumbent on the endorser to show the holder where the maker is to be found.—4 Serg. & R. 480.

A protest of a promissory note is not absolutely necessary,—1 Yeates, 147, nor of an inland bill of exchange.—6 Wheat. 146.—8 Wheat. 326.

The neglect to make a proper presentment, may, as far as respects the drawer's liability, be excused by the

drawee's not having had effects of the drawer in his hands from the time of drawing the bill to the time when it became due; 7 East, 359; and, where a bill drawn on Leghorn was not presented in due time, owing to the political state of the country, which rendered it impossible to present it, it was held, that its being afterwards presented for payment as soon as practicable, and refused, the holder might recover; and evidence of this impossibility of presenting the bill at the time of maturity, might be given, under the usual averment, that the bill was duly presented.—2 Smith's Rep. 223.

The contract of the acceptor of a bill, and of the maker of a note being absolute, they cannot, in general, resist an action, on account of the neglect to present the bill or note at the precise time when due, or of an indulgence to any of the other parties; Doug. 347.—Esp. Ni. Pri. 46; but where the acceptor or maker aforesaid, appoints the payment to be made by another person, as at his banker's, he, as well as every endorser, is, prima facie, entitled to insist on the want of a proper presentment to such person, where the banker, being indebted to him in the amount of the bill or note, has failed; but such prima facie evidence may be rebutted by proof of the want of effects in the hands of such banker.—Chitty on Bills, 265.

A person who has guaranteed the due payment of a bill, may be released from responsibility, by the neglect of the holder duly to present it for payment, if he can show that he was thereby injured.—2 Taunt. 206.—8 East, 242.

It is not necessary, that the demand should be personal; it being sufficient, if it be made at the house of the acceptor.—2 Esp. Rep. 512.

If the drawee have merely *removed* from the place in which the bill represents him to reside, it is incumbent on the holder to use every reasonable endeavour to find out whither he has removed; and, in case he

succeed in such attempt, to present it for payment at that place.—Stra. 1087.—12 East, 433. S. C. But, if the drawee have *absconded*, that circumstance will sufficiently excuse the not making any further inquiries. —Lord Raym. 743.

The reason why the law requires notice is, that it is presumed that the bill is drawn on account of the drawee's having effects of the drawer in his hands; and that if the latter have notice that the bill is not accepted, or not paid, he may withdraw them immediately. —1 Term Rep. 410.—1 Esp. Rep. 332.—1 Bay, 291.

Yet, though it appear that the drawer had no effects in the hands of the drawee, no action can be maintained against the *endorser*, if no notice was given to *him* of the bill being dishonoured; for, though the drawer may have received no injury, the endorser, who must be presumed to have paid a valuable consideration for the bill, probably has.—1 Term Rep. 714. Peake, N. P. 202.—1 Dall. 271.—1 Cranch, 259.

Interest on a bill of exchange commences from the time of the demand; and, therefore, if there were no demand made, till action brought, defendant may plead tender and refusal, &c. and so discharge himself of interest: but if it be the defendant's fault that demand could not be made—as, if he were out of the kingdom—there, want of demand, ought not to injure the plaintiff. —4 Bac. Abr. 731.

A bill drawn in New-York on Charleston or any other place in the United States, is an *inland* bill, on which a protest for non-acceptance or non-payment is not necessary; but a regular notice of non-acceptance is requisite to charge an endorser.—5 John. Rep. 375. New-York.

But in the case of Londsdale v. Brown, Washington J. held that a bill drawn in one state upon a person residing in another state, is a *foreign* bill.—C. C. Oct. 1821. M. S. Pennsylvania.

If, at the time of presentment, the drawee be dead, the holder should inquire after his personal representative, and present the bill to him; and, in case there be no representative, should demand payment at the house of the deceased.—Chitty on Bills, 268.

It is sufficient to demand payment of the person on whom the bill is drawn; and it is unnecessary, in case of default of payment, to make any demand on the drawer, previously to an action against the endorser. —2 Burr. 669.—Rep. Temp. Hardw. 322.

Where a note is made payable at a certain bank, payment must be demanded at that bank, in order to make the endorser liable.—1 Car. Law. Rep. 482.

If he to whom the money is to be paid, dies, there can be no protest before probate of his will, or administration granted; for none but his executors or administrators can give a legal discharge or acquittance for the money, and consequently none others can sue for or demand the same: and, though security be offered to indemnify the drawee against the executors or administrators; yet he is not obliged to accept thereof, it being a matter left entirely to his own discretion, to judge and determine upon the sufficiency of such security; and in this case, it is said, that if a public notary protest the bill, an action on the case lies against him.—Molloy, 285.

No precise form of notice to the endorser of a promissory note, is necessary; and it is not necessary to state in the notice who is the holder; nor will a mistake as to the date of the note vitiate the notice, if it convey to the party a sufficient knowledge of the particular note which has been dishonoured.—11 Wheat. 431.

Whenever the government of the United States through its lawfully authorised agents, becomes the holder of a bill of exchange, it is bound to use the same diligence, in order to charge the endorser, as is

requisite in a transaction between private individuals. —12 Wheat. 559.

SECTION XX.

The day on which a bill, &c. should be presented for payment; and herein of days of grace, &c.

When a bill, &c. is payable at *usance*, or at a certain time after date or sight, or after demand, it is not payable at the precise time mentioned in the bill, *days of grace* being allowed; but in the case of bills, &c. payable *on demand*, no such days are allowed.—4 Term Rep. 141, 170.

The author of this work, from his own experience, and knowledge of mercantile law, has no hesitation in saying, that in the case also of bills, &c. payable *at sight*, no days of grace are allowed.

If a bill be drawn at *one day* after sight, it is not due until the 4th day after acceptance. Thus if accepted on the 1st of a month, it would not be due until the 5th.—Beawes, pl. 256.

When a bill is drawn at a place using one style, and payable on a day certain at a place using another, the time when the bill becomes due must be calculated according to the style of the place where it is payable. —Kyd on Bills, 7 &c.—Bayl. 68. &c; because the contract created by the making of a bill of exchange is understood to have been at that place, and consequently should be construed according to its laws. —Bayl. 68.—Beawes, pl. 251.—Mar. 102.

Thus, a bill drawn at Amsterdam, made payable at Hamburgh on the last day of November, is to be understood that day of *old style;* and vice versa, for a bill drawn in the same manner from Hamburgh to Amsterdam.—Beawes, Lex, Mer. 455.

Old style, it is said, still prevails in Russia, Denmark, Holstein, Hamburgh, Utrecht, Gueldres, East Friesland, Geneva, and in all the protestant principalities in Germany, and the cantons of Switzerland. —Beawes, pl. 258.—Bayl. 68.—Kyd, 7, 8.—Mar. 56.

Although the general rule of law is, that, when computation is to be made *from* an act done, the day in which the act is done must be included.—3 East, 407. —3 Term Rep. 623; the law relating to bills of exchange is different; for, the custom of merchants is settled, that where a bill is payable at usance, or at so many days after sight, or from the date, the day of the date, or of the acceptance, must be *excluded;* and therefore, if a bill, payable ten days after sight, be presented on the 1st day of a month, the ten days expire on the 11th, and the bill, by the addition of the days of grace, when they are three in number, becomes due on the 14th.—Chitty on Bills, 271.

The "days of grace" which are allowed to the drawee, are so called because they were formerly merely *gratuitous*, and not to be claimed as a *right*, by the person on whom it was incumbent to pay the bill, and were dependent on the inclination of the holder. They still retain the name of grace, though the custom of merchants, recognised by law, has long reduced them to a certainty, and established a *right* in the acceptor to claim them, in all cases of bills or notes payable at usance, or after date, after sight, or after a certain event.—4 Term Rep. 151.—Vin. Ab. tit. Bills of Ex. B. 9.*

The number of these days varies according to the custom of the different countries. The following is a list of the days of grace established by the law merchant in different countries.—Beawes, pl. 260.—Mar. 94.—Kyd, 9.—Bayl. 67.

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* Except in France and Massachusetts. See post.

England, Scotland, Wales, Ireland, Bergamo, Vienna, and the United States, (except Massachusetts* and the District of Columbia,)	3 days.
District of Columbia,	4
Frankfort, out of the fair time,	4
Leipsick, Naumberg, and Augsburg,	5
Venice, Amsterdam, Rotterdam, Middleburg, Antwerp, Cologne, Breslaw, Nuremburg, and Portugal,	6
Naples,	8
Dantzick and Koninsburgh,	10
Hamburgh and Stockholm,	12
Spain,	14
Rome,	15
Genoa,	30
Leghorn and Milan, and some other places in Italy, no fixed time.	

On bank post bills, payable after sight, it has been said, that no days of grace are claimed.—Lovl. 247.

The days of grace which are allowed on a bill of exchange, must always be computed according to the law of the place where it is due.—Kyd, 8.

At Hamburgh, the day on which the bill falls due, makes one of the days of grace; but it is not so elsewhere. In Great Britain, Ireland, Amsterdam, Rotterdam, Antwerp, Middleburg, Dantzick, Koninsburg, and the United States, Sundays and holidays are always included in the days of grace; but not so at Venice, Cologne, Breslau, and Nuremburg. In England, if the third day of grace happen to be a Sunday, Christmas-day, or Good Friday, (39 & 40 Geo.

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* Days of grace are not allowed in Massachusetts, unless expressly stipulated in the contract.—4 Mass. Rep. 245.

In France, the days of grace are abolished by the new commercial code; and all bills and notes are payable at the time mentioned in the bills.—Code de Commerce, Liv. 1 tit. 10.

III. c. 42.) on which no money ought to be paid, the holder ought to present for payment on the second day of grace, and in case it be not then paid, must treat the bill as dishonoured.—Ld. Raym. 743.—3 Bos. & Pul. 599. In other cases, a presentment before the third day of grace, being premature, would be a mere nullity.—1 Esp. Rep. 262.

In the United States, if a bill fall due on a Sunday, it must be paid on the Saturday previous, or be protested.—6 Wheat. 102.

In New York, it has been determined, that the 4th of July is a public holiday; and if that be the last day of grace, the bill must be paid on the 3d of July.—2 Cain. Ev. 195.

The holder of a bill is not bound to wait till the last moment of the last day of grace; for the undertaking of the acceptor is to pay the bill on demand, on any part of the last day of grace.—4 Term Rep. 173; and notice to the endorser, afterwards, on the same day, is good.—1 Johns. Cases, 328.

The holder of a note endorsed after it is due, is bound to demand payment from the maker in some reasonable time, or to make some reasonable efforts to do so.—2 Rep. Con. Ct. 33.

The term *usance*, is French, and signifies the time which it is the *usage* of the countries between which bills are drawn, to appoint for payment of them.—Poth. pl. 15.—3 Bos. & Pul. 339. The length of the usance, or time which it includes, varies in different countries, from fourteen days, to one, two, and even three months after the date of the bill. Double or treble usance is double or treble the usual time, and half usance is half that time: when it is necessary to divide a month upon a half usance, the division, notwithstanding the difference in the length of the month, contains fifteen days. —Mar. 93.

A *usance* between London and	Amsterdam, is one calendar month after date.	
	Aleppo, (sometimes accounted as treble usance,) - -	1 do.
	Altona, - - - -	1 do.
	Antwerp, - - -	1 do.
	Brabant, - - -	1 do.
	Bilboa, - - - -	2 do.
	Bruges, - - - -	1 do.
	Flanders, - - -	1 do.
	Florence, (sometimes accounted as treble usance,) -	1 do.
	Genoa, - - - -	3 do.
	Hamburgh, - - - -	1 do.
	Holland, - - -	1 do.
	Leghorn, - - -	3 do.
	Lisbon and Oporto, -	2 do.
	Lucca, sometimes - -	3 do.
	Lisle, - - - -	1 do.
	Spain, - - - -	2 do.
	Middleburgh, - - -	1 do.
	Milan, - - - -	3 do.
	Paris, - - - -	1 do.
	Rome, - - - -	3 do.
	Rouen, - - - -	1 do.
	Venice, - - - -	3 do.
	Zant, - - - -	3 do.
	Zealand, - - - -	1 do.
Usance between Amsterdam and	Brabant, France, Flanders, and Holland or Zealand, is 1 cal. mo.	
——— ——— Amsterdam and	Italy, Spain, and Portugal, is 2 cal. mo.	
——— ——— Amsterdam and	Frankfort, Nuremburg, Vienna, and other places in Germany, 14 days after sight.	

These usances are calculated *exclusively* of the day of the date of the bill. At the expiration of the appointed usance, the bill would be apparently due, but the custom of merchants has allowed the drawee further time, called days of grace, which are in general calculated as before-mentioned, exclusively of the last day of usance; and on the last of these days, the bill should, in this country, be presented for payment: *ante.*

When bills, &c., are payable at one, two, or more *months after date or sight*, the mode of computing the time when they become due, differs from the mode of computation in other cases. In general, when a deed, or act of parliament, mentions a month, it is construed to mean a *lunar* month, or 28 days, unless otherwise expressed; 2 Bla. Com. 141.—6 Term Rep. 224.—Doug. 464; but in the case of bills and notes, the rule is otherwise, and when a bill is made payable at a month or months after date, the computation must, in all cases, be by *calendar*, and not by lunar months.

Thus, when a bill is dated the 1st of January, and payable at one month after date, the month expires on the 1st of February, and, with the addition of the days of grace, the bill is payable on the 4th of February, unless that day be a Sunday, and then on the 3rd.—Beawes, pl. 253.—Mar. 74, 90.

When one month is longer than the succeeding month, it is said to be a rule not to go, in the computation, into a third month:—thus, on a bill dated the 28th, 29th, 30th, or 31st of January, and payable one month after date, the time expires on the 28th of February, in common years, and in the three latter cases, in leap year, on the 29th.—Mar. 75.—Kyd, 6.

Another method of drawing bills, is to make them payable at a day certain. For example, a drawer gives his bill to be paid on the 1st of May, which, allowing three days of grace, falls due on the fourth.

SECTION XXI.

When checks, bills, &c. payable on demand, should be presented for payment.

When a check, or bill, &c. is expressed to be payable *on demand*, or when no time of payment is expressed, it is payable instantly on presentment, without any allowance of days of grace, and the presentment for payment of such a check or bill must be made within a reasonable time after the receipt of it.—Chitty on Bills, 279.

It has frequently been disputed, whether it be the province of the court, or of a jury, to determine upon the reasonableness of the time within which a check, &c. payable on demand, should be presented for payment. Formerly, it was thought to be a question for the jury; but the decisions, even of mercantile juries, were found so much at variance with each other, that, for the sake of certainty on the subject, it is now settled, that the reasonableness of the time for presentment, is partly a question of fact, and partly of law. The jury are to find the facts, such as the distance at which the parties are from each other, the course of the post, &c.; but, when those facts are established, the reasonableness of the time is a question of law, upon which the judge is to direct the jury. Many of the decisions on this subject, are collected in Mr. Justice Bayley's and Mr. Kyd's treatises on Bills; from which, it may be collected, that the opinion of juries of merchants has been, that a check on a banker, or a cash-note, &c. payable on demand, ought, if given in the place where it is payable, to be presented for payment the same day on which it is received, if the distance, or other circumstances, will possibly allow. But, in point of law, there is no other settled rule, than that the presentment must be made *within a reasonable time*, which, as observed by Lord Ellenborough. C. J. —6 East, 4, 8, 9; must be accommodated to other bu-

siness and affairs of life, and the party is not bound to neglect every other transaction, in order to present the check, &c. the same day on which he receives it. As observed by Lord Mansfield, it would be unreasonable to suppose, that a tradesman should be compelled to run about the town with a dozen drafts, from Charing-Cross to Lombard street, on the same day; and he directed the jury to consider, that twenty-four hours was the usual time allowed for the presentment for payment.—Kyd, 45, 127, 8.—2 Salk. 442. S. P.

However, in another case, where the plaintiff received a banker's note at half-past eleven in the morning of the 18th of January, and he did not send it for payment until the next day at two, at which time the banker had stopped payment, it was held, that the plaintiff was guilty of laches, by not presenting it, at farthest, in the morning of the next day after he received the check.—Stra. 1175.—ibid. 508; and, according to this case, and the current of authorities, it seems now sufficient to present a check or a banker's note, received on any part of the day, early in the next morning.—Chitty on Bills, 282.

On the whole, it is obvious, that it must be advisable, in general, for the holder to demand payment the same day on which he receives it, unless prevented by distance, or some inevitable cause or accident, which, in all cases, will excuse the neglect to make a presentment as soon as it would otherwise be necessary.—Kyd, 46.—Beawes, pl. 22, et ante.

SECTION XXII.

Time of the day when presentment should be made.

A presentment for payment of a bill, payable on a day certain, should, in all cases, be made within a reasonable time before the expiration of the day when it is due; and, if it be the known custom of any particular place, that bills are payable only within limited

hours, a presentment there out of those hours, would be improper. This rule extends also to a presentment, out of the hours of business, to a person of a particular description; where, by the known custom of the place, all such persons begin and leave off business at stated hours.—4 Term Rep. 170.

Therefore, when a bill is accepted, payable at a banker's, it must be presented there before the usual hours of shutting up the bank, and presentment afterwards will not entitle the notary to protest it.—7 East, 385.—3 Smith's Rep. 358. S. C.

But it seems that this strictness prevails only where a bill is payable at a banker's.—2 Camp. 527.—2 Taunt. 224.

Though it has been held that bankers are not guilty of neglect by giving up the bill to the acceptor upon his delivery to them of his check on another banker; —6 Term Rep. 13; this doctrine may now be questionable.

The holder of a bill is not bound to wait till the last moment of the last day of grace; for the undertaking of the acceptor is to pay the bill, on demand, on any part of the last day of grace.—4 Term Rep. 173; and notice to the endorser, afterwards, on the same day, is good.—1 Johns. Cases, 328.

SECTION XXIII.

How payment is to be made.

When a bill is drawn here, and payable in a foreign country, in foreign coin, the value of which is reduced by the government of that country, it is said that the bill shall be payable according to the value of the money at the time it was drawn.—Skin. 272.

In one case, it was decided, that a banker, having a bill remitted to him to present for payment, is not guilty

of negligence in giving it up, on receiving from the acceptor a check upon another banker, for the amount, payable the same day, although such check be afterwards dishonoured.—6 Term Rep. 12.—1 Stra. 416. —3 Bos. &. Pul. 601.

But, in a late case at Nisi Prius, it was held, that the drawer and endorsers of a bill would be discharged by the holder's taking a check from the acceptor, and delivering up the bill to him, in case the check be not paid; because the drawer and endorsers have a right to insist on the production of the bill, and to have it delivered up on payment by them.—Chitty on Bills, 298.

If, however, the holder of a draft on a banker, receive payment thereof in the banker's notes instead of cash, and the banker fail, the drawer of the check will be discharged.—2 Show. 296.

But, if a creditor, on any other account than a bill of exchange, be offered cash in payment of his debt, or a check upon a banker from an agent of his debtor, and prefer the latter, this does not discharge the debtor, if the check be dishonoured, although the agent fail with a balance of his principal in his hands to a much larger amount.—2 Camp. 515.

SECTION XXIV.

Of the effect of giving time to the acceptor, &c.; of compounding with them; and receiving a dividend under a commission of bankruptcy, &c.

If, when a bill, &c. becomes due, the holder give time to the drawee, without the concurrence of the other parties to the bill, they will thereby in general be discharged from all liability, although the holder may have given due notice of the non-payment.—3 Bos. & Pul. 365.—8 East, 576.—Cooke's Bank Law, 168, 171, &c.

There is no obligation of *active diligence* on the part of the holder to sue the acceptor, or any other party, and he may forbear to sue as long as he chooses; but he must not *agree* to give time to the acceptor to the injury of the drawer and endorsers.—6 Ves. jun. 734. —10 East, 40.

The acceptor of a bill is primarily liable, and the drawer and endorsers may be considered in the nature of sureties for the performance of his act.—3 Bos. & Pul. 366; therefore, the taking of a bond, or any security payable at a future day, from the acceptor of a bill, or maker of a note, without the assent of the other parties thereto, would discharge them from liability.—3 Mod. 87; and, where the endorsee of a bill, having sued the acceptor to judgment, and taken out execution, received from him a sum of money in part payment, and took his security for the residue, with the exception of only a nominal sum; it was held that he was thereby precluded from afterwards suing the endorser.—2 Bos. & Pul. 61.—3 Esp. Rep. 49. S. C. —1 Bos. & Pul. 652; and the letting such acceptor out of custody on a *ca. sa.* would have the same effect. —ibid.

Whenever a new credit is given to the drawer, the holder takes it upon himself, and the endorser is discharged.—1 Bay, 177.

If the holder accept a deposit as security, and part with it without the consent of the endorser, he thereby discharges the latter.—1 Nott & McC., 116.

The question is not, whether the endorser is benefited by the delay, or not: when time is given to the drawer, or a new security taken, he is discharged.—1 Rep. Con. Ct. 371, 373.

Where the holder sued both drawer and endorser, and took a confession of judgment from the former, payable by instalments, it was held, that by this, the endorser was discharged.—ibid. 367.

In a late case, it was held, that if the holder of a bill of exchange when due, after taking part payment from the acceptor, agree to take a new acceptance from him for the remainder, payable at a future day, and that, in the mean time the holder should retain the original bill in his hands as a security; such agreement amounts to giving time and a new credit to the acceptor, and discharges the endorser, who was no party to such agreement, though the drawer might have had no effects in the hands of the acceptor.—8 East. 576.

Similar indulgence to a drawer or a prior endorser, would also discharge all subsequent parties.—ibid.

But a mere agreement by the holder of a bill, with the drawer, for delay, without any consideration for it, and without any communication with, or assent of the endorser, will not discharge the latter, after he has been fixed in his responsibility by the refusal of the drawee and due notice to himself.—12 Wheat. 554.

Where the laches of the holder, in not giving notice of the non-acceptance of a bill, will be excused by the circumstance of the drawer, endorser, &c., not having effects in the hands of the drawee, such parties would also not be discharged by the holder's giving time to the acceptor, or taking security from him.—1 Bos. & Pul. 652.—2 Esp. Rep. 516. S. C.—Cooke's Bank Law, 167.

Where the holder of a bill of exchange discharges a party who is liable to the payment of it, all other parties to it, whose liability is subsequent to that of the party discharged, are thereby discharged also.—6 Mass. 85.

But if the holder of a bill of exchange discharge a party who would not be liable to the other parties, although prior to them;—for example, where they have retained in their hands the money of the party discharged, for the express purpose of paying the bill; such discharge will not operate a discharge of those to

whom the party discharged would not have been liable.—ibid.

If the holder of a bill of exchange protested for non-acceptance, demand and receive collateral security from the drawer, and afterwards give up the security before the maturity of the bill, the endorser is not thereby discharged from his liability.—12 Mass. 502.

If an existing note be paid in a note, bill, or the like, and it be not actually given and received in satisfaction, and it turn out unproductive, it is no payment, unless the creditor, by his subsequent conduct, make it his own.—1 Wash. C. C. R. 328.

Though the giving of time to an acceptor, or endorser, will thus, in general, discharge all subsequent endorsers, who would be entitled to resort to the party indulged, the giving of time to a subsequent endorser, will not discharge a prior endorser; and, therefore, the holder of a bill may sue a prior endorser, after having let out of jail a subsequent endorser, whom he had taken in execution, on a letter of license, without paying the debt.—Chitty on Bills, 304, 5.

If, when a bill becomes due, the acceptor be a *bankrupt*, the holder may, without the assent of the other parties, *prove* the bill under the commission, and receive a dividend or dividends; and such conduct will not discharge the other parties to the bill, from their respective liabilities to him, if he have given regular notice of non-payment.—11 Ves. jun. 412.—1 Bos. & Pul. 286.

But, if the holder of a bill *compound* with the acceptor or other party, without the assent of the drawer, or other subsequent parties, he thereby releases them from their liabilities, if they had effects in the hands of the acceptor or prior endorser; for there is a material distinction between taking a sum of money in part satisfaction of a debt, as in the case of a dividend, and taking a sum in satisfaction of such debt, where

the party has an option to refuse less than the whole; as, where he compounds with the acceptor, and thereby deprives all other parties to the bill of the right of resorting to him.—11 Ves. Jun. 410.—3 Bro. Ch. C. 1.—1 Montague, 546.

Where the endorser of a bill of exchange becomes bankrupt, and the holder proves the amount of the bill under his commission, and afterwards compounds with and discharges the acceptor without the consent of the assignees of the endorser, he thereby also discharges the endorser's estate, and the proof of his debt must be expunged.—3 Bro. Ch. C. 1.—11 Ves. j. 410.

If the holder of an accommodation bill receive a part from the drawer, and take a promise from him on the back of the bill for the payment of the residue at an enlarged time, it may be doubtful whether such act will discharge the acceptor.—Doug. 250.—1 Hen. Bla. 88.

It is said, that if the drawee have, on presentment for acceptance, undertaken to pay a part, and the holder have given notice of such partial acceptance to the other parties, he should, when the bill becomes due, receive from the drawee the sum for which he accepted, and cause a protest again to be made for non-payment of the remaining sum.—Mar. 68, 85, 86.

If the holder of a promissory note prove his demand under a commission of bankruptcy, issued against the first endorser, and afterwards, but before a dividend is made under the commission, demand, and receive payment of the note from the second endorser, and then receive a dividend under the commission, he shall account to such second endorser for the amount of such dividend, and not to the creditor of the bankrupt.—4 Mass. 95.

SECTION XXV.

Of the receipt for payment.

On payment of the amount of a bill or note, it has been considered doubtful, whether the person paying can insist upon a *receipt* being given.—Chitty on Bills.

As it has been held that a general receipt on the back of a bill of exchange, is *prima facie* evidence of its having been paid by the acceptor, (Peake, C. Ni. Pri. 25: sed vide 2 Camp. 439.) it would perhaps be advisable, in all cases, when payment is made by a drawer or endorser, for the holder to state, in the receipt, by whom it was paid. In a late case, however, it was held, that the production of a bill of exchange, from the custody of the acceptor, is not prima facie evidence of his having paid it, without proof that it was once in circulation after it had been accepted; nor is payment to be presumed from a receipt endorsed on the bill, unless such receipt is shown to be in the handwriting of a person entitled to demand payment.—2 Camp. 439.

But in the case of Egg v. Barnett, (3 Esp. Rep. 196.) it was held, that payment of money may be proved by the lender producing a check, drawn by him upon his banker, in favour of the borrower, and endorsed by the latter; though, without such endorsement, it would not be evidence.

SECTION XXVI.

Of the effect of payment.

If a person, under the misapprehension of facts, pay a bill which he was under no legal obligation to discharge, as, where the person whom he paid had been guilty of laches, which, had the bill not been paid, might, in an action brought upon it, have been a sufficient ground of defence, he may, if injured thereby, in

general recover back the money, as had and received to his use.—Chitty on Bills, 309.

But a bona fide holder, not guilty of laches, cannot, in general, be compelled to refund; and, where the drawee of two forged bills, accepted one and paid the other, it was decided that he could not recover back the amount from the bona fide holder.—1 Bla. Rep. 390.

If bankers pay a cancelled check, drawn by a customer under circumstances which ought to have excited their suspicion, and induced them to make inquiries before paying it;—2 Camp. 485; or if they pay a check, after notice from their customer not to do so, they cannot take credit for the amount in their accounts.

SECTION XXVII.

The conduct which the holder should pursue on non-payment.

The conduct which the holder of a bill, &c. should pursue on non-payment, is very similar to that which is to be adopted on refusal to accept.

The necessity for giving notice of non-payment, is governed by nearly the same rules as prevail in the case of non-acceptance.

Notice, we have seen, ought in general to be given, otherwise the drawer and endorsers will be discharged from all liability. The want of effects of the drawer or endorser, &c. in the hands of the acceptor of the bill, or maker of the note, will, we have already observed, in general excuse the neglect to give due notice; but few other circumstances will have that effect.

When a bill has already been protested for non-acceptance, and due notice thereof has been given, though usual, it is not necessary to protest for non-payment, or to give notice thereof.—Price v. Dardel, cor. Ld. Kenyon, Sittings at Guildhall, Lond. 11 Dec. 1794. —5 Johns. Rep. 375.—3 ibid. 202.

With respect to the form of the notice of non-payment, and the mode of giving it, the rules relating to non-acceptance here also in general prevail.

The protest for non-payment, which is made by a notary public, varies in point of form according to the country in which it is made. The form adopted by the Bank of the United States is as follows:—

BE IT KNOWN, That on this ——— day of ——— Anno Domini, ——— at the request of the President, Directors, and Company of the Bank of the United States, the holders, I, Clement C. Biddle, Esquire, notary public for the commonwealth of Pennsylvania, duly commissioned and sworn, residing in the city of Philadelphia, presented the original bill of exchange (*promissory note, check, &c. as the case may be,*) whereof a true copy is on the other side written, to A. B. of the said city, on whom the same is drawn (*or to a certain person, describing him or her, at the office or dwelling-house of the acceptor*) and, demanding payment thereof, received answer that it would not then be paid. And whereupon I the said notary, at the request aforesaid, have and do hereby solemnly protest against the drawer, acceptors, and endorsers of the said bill, (*note, check, &c.*) and all others concerned, for all exchange, re-exchange, costs, damages, and interest, already suffered and to be suffered for want of payment of the same.

Thus done and protested at Philadelphia, the day and year aforesaid.

In Testimonium Veritatis.

C. C. B.

[Seal.] Not. Pub.

Notary's Fee, $1 37½.

By the statute 9 & 10 W. III. which first legalized, in England, protesting of *inland* bills for non-payment, if there be no notary public in the place where the bill is payable, "the holder or his agent, may cause the bill

to be protested by any other substantial person in the place, in the presence of two witnesses; refusal or neglect being first made of due payment of the same; which protest shall be made and written under a copy of the bill of exchange, in the words or form following:—

"Know all men, that I, *A. B.* on the ——— day of ——— at the usual place of abode of the said ——— have demanded payment of the bill, of which the above is the copy, which the said ———, did not pay, wherefore I the said *A. B.* do hereby protest the said bill. Dated this ——— day of———."

Though promissory notes are usually protested in the same manner as bills of exchange, yet, in *strictness*, it is the opinion of the author of this work, they need not be protested; and in England, the expense of protest cannot be recovered at law. However, custom seems in favour of protesting them, and it is, in all cases, the *safest* way to treat them in the same manner as bills of exchange.

Where only part of the money for which the bill is payable is tendered, that part may be taken, and the bill must be protested for non-payment of the residue. —1 Bos. & Pul. 652.

Where the holder of a note, on the day it was payable, received a part from the maker, and gave notice of non-payment, generally, to the endorser, it was held sufficient to charge the endorser with the payment of the residue.—1 Johns. Cases, 131.

A person, having a right to draw, in consequence of engagements between himself and the drawee, or in consequence of consignments made to the drawee, or from any other cause, ought to be considered as drawing on funds in the hands of the drawee, and therefore as not within the rule that a drawer, who has no effects in the hands of the drawee, is not entitled to notice. —4 Cranch, 141.

If a person receives a check drawn by another, and

passes it in payment, he stands in the situation of an endorser of a bill, and, unless he knew that the drawer had no money in bank, is not liable, except on due diligence and notice.—2 Litt. 299.

The endorser of a note is entitled to strict notice, though he endorsed merely for the accommodation of the maker.—4 Cranch, 141.—2 Caines' 343.

Notice to the drawers, of non-payment, by sending to their counting-house, during hours of business, on two successive days, knocking there, and making noise sufficient to be heard by persons within, and waiting there several minutes, the inner door of the counting-house being locked, is sufficient, without leaving a notice in writing, or sending by the post, though some of the drawers live at a short distance from the place. —1 M. & S. 545.

Where a bill of exchange passed through the hands of five persons, all of whom lived in London, or the neighbourhood, and the bill, when due, being dishonoured, the holder gave notice on the same day to the fifth endorser, and he on the next day to the fourth, and he on the next day to the third, and he on the next day to the second, and he on the same day to the first, the Court were of opinion, on a case finding these facts, that due diligence had been used.—6 East, 14.— 2 Camp. 208, 374.

In the case of Smith v. Mullett, (2 Camp. 208, 374.) which was an action by the *fourth* against the *first* endorsee, all the parties to which resided in London, it appeared that the plaintiff received notice of the dishonour of the bill from his endorsee, on the 20th of the month, and gave notice to his immediate endorser, by a letter put into the two-penny post-office, on the evening of the 21st, but so late, that it was not delivered out till the morning of the 22nd;—it was held, that, by this neglect, the plaintiff had discharged all the prior endorsers, although, in the course of the 22nd, notice of the dishonour was given, both to the *second*

endorsee and to the defendant;—and Lord Ellenborough, in this case, said, "It is of great importance that there should be an established rule upon this subject; and I think that there can be none more convenient, than that, when the parties reside in London, each party should have a *day* to give notice. I have before said, the holder of a bill of exchange is not,—all other business being laid aside—to devote himself to giving notice of its dishonour. It is enough, if this be done with reasonable expedition. If you limit a man to the fractional part of a day, it will come to a question, how swiftly the notice can be conveyed? A man and a horse must be employed, and you will have a race against time. But here, *a day has been lost.* The plaintiff had notice himself on Monday, and does not give notice to his endorser until Wednesday. If a party has an entire *day*, he must send off his letter conveying the notice, within post-time of that day. The plaintiff wrote the letter to Aylett only on the Tuesday: it might as well have continued in his writing-desk on the Tuesday night, as lie at the post-office. He has clearly been guilty of laches, by which the defenndant is discharged."

In Marsh v. Maxwell, (2 Camp. 210.) Lord Ellenborough ruled, that, upon dishonour of a bill, it is not enough that the drawer or endorser receive notice in as many days as there are subsequent endorsers, unless it be shown that each endorsee gave notice within a day after receiving it; and, if any one has been beyond the day, the drawer and prior endorsers are discharged.

From the above-mentioned case of Smith v. Mullett, it appears, that though the holder is not bound to send a special messenger, and may give notice by the post, he must take care to put the letter into the post-office sufficiently early on the day after he has himself received notice, that the party to whom it is addressed, may receive the letter on that day.

Where the endorser of a *note* lives in the same town

with the promissor, he ought to have notice of the non-payment on the same day on which the demand is made.

Where it may be necessary to give notice of non-payment to a banker, it may be proper to give it in the usual hours of business; but to other persons, the particular hour of the day is not, in general, material.—2 Taunt. 224.—2 Camp. 527.

It has been decided in New York, that personal notice was necessary to be proved, where the party to be notified lived in the same town or city with the holder. A letter put into the post-office was held insufficient, where the party lived three miles from the city, but beyond the letter-carriers' distance.—10 Johns. Rep. 490. —11 Johns. Rep. 231.

An endorser of a promissory note for the accommodation of the maker, is entitled to strict notice.—4 Cranch, 141.

Where an agent receives a bill in order to obtain payment, he must send notice of non-acceptance and non-payment to the remitter, whose duty it is to give immediate notice to the drawer—2 Johns. Cases, 1.

If the agent himself undertakes to give notice to the drawer, it will be sufficient if it be given as soon, as, under the circumstances of the case, it could have been received from the holder.—ibid.

The prevalence of a malignant fever in the city of New York, was held a sufficient excuse for not giving notice until November, of a protest for non-payment made in September.—ibid.

There is no particular form of notice to the endorser of a note, prescribed by law. It is enough, if, under all the circumstances, it was sufficient to put him on inquiry; and this is properly a question of fact for the jury to decide.—2 Johns. Cases, 337.

The second endorser of a promissory note, when

called upon to pay in default of the maker, should take up the note, and immediately give notice to the first endorser; and, if he fails to give such notice, as soon as he receives it from the holder, the preceding holder is not liable to him.—3 Johns. Cases, 89.

Where a bill has been protested for non-acceptance, and due notice given to the endorser, it is no objection to a recovery against the endorser, that the demand of payment and protest, &c. were a day too late, as they are not essential, the liability of the endorser being already fixed by the non-acceptance and notice.—5 Johns. Rep. 395.

Notice of dishonour sent by mail, is sufficient and proper between places where post-offices are established; but, where the endorser lives in the country, and not on a post-road, a special messenger ought to be employed, or other means used to convey the notice, with the same certainty and despatch.—3 Litt. 498.

Notice to an endorser must be given, although he is beyond sea, if the place of his residence be known; and reasonable diligence must be used, to find out his place of residence.—3 Wash. C. C. R. 206.

A notary, in protesting a bill or note for non-payment, is not bound to give notice to the endorsers. If he promise the holder to give notice to the endorsers, so as to enable him to recover his money, and he give notice to the second endorser, but not to the first, and the holder afterwards recover the full amount from the second endorser, the notary is not liable, on that promise, to the second endorser, for not giving notice to the first endorser.—2 Johns. Rep. 204.

Yet, where the bill was drawn for the accommodation of the payee, who had placed security in the hands of the drawee, and the bill was actually accepted, it was held, that the drawer was not discharged, though notice of the non-payment of the bill was not given to him.—1 Bos. & Pul. 652.

SECTION XXVIII.

Of payment, supra protest.

Payment of a bill, whether foreign or inland, being refused, any third person, not party to the bill, as he might have accepted, so he may pay it, *for the honour* of the drawer, or any of the endorsers; Lutw. 891, 892; which payment, as it is always made after protest, is called payment *supra protest;* Beawes, pl. 50; but the acceptor, if he have previously made a simple acceptance, cannot pay in honour of the endorser, because, as acceptor, he is already bound in that capacity.—Beawes, pl. 51.

A party paying a bill supra protest, which has already been accepted by another, may sue such first acceptor.—5 Ves. jun. 574.

In general, no person should pay in honour of another, before the bill has been protested for non-payment; and it is said that he should not then make such payment, before he has declared, to a notary-public, for whose honour he intends making it; of which declaration, the notary must give an account to the parties concerned, either in the protest itself, or in a separate instrument.—Beawes, pl. 53.—Mar. 128.

Although, with respect to other debts, a stranger, who has no interest in them, does not, by paying them, entitle himself to the rights of a creditor, unless he have the consent of the debtor to such payment; yet, with regard to bills of exchange, a stranger who pays them in case of protest, acquires all the rights that the holder of the bill had, although no regular transfer of the bill were made to him; and he may maintain an action against the person for whose honour he discharged the bill, either on the bill itself, or on the count for money paid to the defendant's use.—Chitty on Bills, 330.

The reason of the above exception to the general

rule, it has been observed, is, that it induces the friends of the drawer or endorsers to render them this service; it tends to prevent the great expense attending the return of a bill; and preserves the credit of the trader, &c.—Beawes, pl. 54.—Poth. pl. 171.

A person taking up a bill for the honour of the drawer, has, however, no right against the acceptor without effects.—3 Ves. jun. 179.—sed vide 5 Ves. jun. 574.

CHAPTER VII.

Sect. 1. Of re-exchange and damages.

2. The remedies at law.

3. The evidence.

SECTION I.

Re-exchange and damages.

Where a bill endorsed over is not duly paid, the endorsee may charge the endorser (or the payee the drawer) with interest, exchange, and other incidental expenses, if such charges be reasonable, warranted by usage, and not made a colour for usury: thus, in England, the constant course has been with respect to bills returned protested from India, to allow 10s. per pagoda, which includes interest, exchange, and all other charges; and this, notwithstanding the current price of exchange at which the bill was discounted, may have been greatly below 10s. as at 6s. 6d. and the holder will also be entitled to interest at 5 per cent. from a reasonable time after notice given to the endorser, of the bill having been returned unpaid.—2 Term Rep. 52.

By a statute of Pennsylvania, (anno 1700) if a bill drawn on Europe be returned back unpaid with a legal protest, the drawer and all others concerned shall pay it, together with damages at the rate of 20 per cent. See Chapter VIII. Section VI.

The same rule has been established in New York, by immemorial commercial usage.—4 John. Rep. 122.

A bill having been returned from France, protested for non-acceptance, the drawer, in Philadelphia, without waiting for a protest for non-payment, paid it, with 20 per cent. damages. Before the payment was made, the bill had been protested for non-payment, though it was not known to the parties in Philadelphia. It was held that the defendant might retain the damages with a good conscience, and that the drawer could not recover them back.—1 Dall. 147.

When the bill is received for an antecedent debt, and to be in full *when paid*, no damages can be recovered.—1 Dall. 261.—2 Dall. 100.—4 John. Rep. 27.

The payee of a bill which is neither paid nor received in satisfaction of a precedent debt, but on the condition of its being honoured, is not entitled, on its being protested, to recover 20 per cent. damages.—1 Dall. 261.—4 Dall. 155.

The holder can recover no more than the contents of the bill and 20 per cent. damages with interest, at the par of exchange. He can recover nothing for the difference between the price of bills at the time the bill was returned, and the time it was drawn.—4 John. Rep. 119, 124.

By the *par* of real moneys, is to be understood, "the equality of the intrinsic value of the real species of any country, with those of another;" and by that of exchanges, "the proportion which the imaginary moneys of any country bear to those of another:" so that the rise and fall of an exchange must be attributed either to the current price of the coins of any country,

or to an extraordinary demand in one place, for money in another; or sometimes it is owing to both.—Beawes, 416.

If the holder receive from the acceptor payment of the bill after it is protested, and before it is returned with the protest, he waives his right to damages.—4 Cranch, 333, 345.

A. being indebted to B. living beyond seas, sends him a bill drawn by C. and endorsed "pay to B. for my use," which bill was to be applied in discharge of the debt, when paid. B. may sue the drawer or endorser on the bill if it be protested, though he is not entitled to damages against the endorser.—1 Wash. C. C. R. 512.—2 Wash. C. C. R. 24.

In actions upon foreign bills, the jury is to settle the exchange according to the rate on the day of trial. —3 Wash. C. C. R. 125.—1 Yeates, 204.

If there be no current rate of exchange, the damages must be adequate to exchange at par.—1 Yeates, 204.

The law of the place where the contract is made, governs in the case of damages upon bills.—4 Yeates, 19.

Under the law of South Carolina, where a bill drawn in that state on a person residing in any other of the United States, is protested, the holder is entitled to ten per cent. damages, though the bill is not returned back to South Carolina.—ibid.

But, where such bill is given only as an additional security to a bottomry bond, no damages are recoverable.—ibid.

A writ of error was brought on a judgment by *nil dicit*, in an action against the drawer of an inland bill of exchange, and it was objected, that, since the 9 Will. III., no *damage* shall be recovered against the drawer, upon a bill of exchange, without a protest, and therefore the action lies not, there being no protest.

But Holt, C. J.:—The statute never intended to destroy the *action* for want of a protest, but only to deprive the party of recovering *interest and costs*, upon an inland bill against the drawer, without notice of non-payment by protest.

As the plaintiff, in an action on a bill, has a right to recover gold or silver, the measure of damages must be the value of the bill, at the time of notice of protest, in gold or silver, and not in a depreciated or fluctuating currency.—ibid.

Where the money stated in the bill is sterling money, the jury are to settle the amount according to the rate of exchange at the time of the trial.—3 Wash. C. C. R. 125.

Where a creditor, having goods in his possession, sufficient to liquidate the greater part of his debt, draws, without permission, upon his debtor, who refuses to accept, in consequence of which the creditor has been obliged to pay the ten per cent. damages, it seems that he is not entitled to recover them from the drawee.—12 S. & R. 253.

The person to whom a bill is remitted in payment of an antecedent debt, cannot, in case of a protest, recover the twenty per cent. damages from the remitter. —4 Johns. Rep. 27.

SECTION II.

The remedies at law.

When there are several endorsers, it is not necessary that the action should be brought in the name of the holder, or of the last endorser. They may arrange the matter amongst themselves, and any one endorser may sue the acceptor or drawer, instead of the preceding endorsers, striking out all the names below his own. —1 Bos. & Pul. 658.

If a party who has commenced an action on a bill, deposit it afterwards as a security in the hands of a third person, he may still proceed in the action, if the latter knew that the action was commenced; and if such third person, having had this notice, commence another action against the same defendant, the court will stay his proceedings.—1 Taunt. 109.

It is not necessary, in general, in deriving a title through the endorsement of a firm, to allege in particular who the persons are composing that firm: if the endorsement be made in the name of the firm, by a person duly authorized, it gives a complete title, whoever may compose the firm.—8 Wheat. 642.

Nor is it necessary, in a declaration at the suit of the executor of a surviving partner, to set forth the names of the firm.—ibid.

In an action by the payee and endorser of a bill of exchange against the acceptor, the plaintiff cannot recover the amount of damages and costs which have been recovered against him by his endorsee, without a money count in his declaration.

Where one of a set of three bills of exchange on London, was protested for non-payment, it was held, that an action might be maintained here against the endorser on one of the set not protested, with the protest of the other.—1 Johns. Cases, 107.

The bona fide holder of a bill, check, or note, may, in general, maintain an action thereon against all the parties to it, whose names are on it, and who became so *previously* to himself.—4 Term Rep. 471.*

Thus, the *payee* may, in default of payment, sue the acceptor, whether he accepted as drawee, or merely for the honour of the drawer; and he may also, in

* But, in some of the states, as will appear in a succeeding chapter, a holder cannot sue a *remote* endorser.

such case, sue the drawer. An *endorsee* may in general, sue not only the acceptor and drawer, but also all the prior endorsers; and an assignee, by mere delivery, may sue the acceptor, drawer, and endorsers, but he cannot maintain an action against any person whose name is not on the bill, &c. except the person who assigned it to him; ante. Nor can a person to whom the drawee has endorsed a bill after it was dishonoured, and after it had been paid by the drawer, sue the acceptor in his own name, but must proceed in the name of the drawer.—1 Hen. Bla. 88.

If the holder of a bill make the acceptor his executor, and die, the right of action at law, against all the parties is extinguished, unless the executor formally renounces.—Chitty on Bills, 360.

A bill of exchange drawn by A. in the West Indies, upon himself in Philadelphia, is to be governed by the laws of Pennsylvania, where it was payable.—3 Wash. C. C. R. 313.

A bill of exchange, payable to a person or bearer, is not assignable, so as to enable the endorsee to bring an action, if payment be refused: but, when it is made payable to a person or order, an express power is given thereby to assign, and the endorsee may maintain an action; and the first is a good bill between the endorser and endorsee.—1 Salk. 126.

An endorsee of a promissory note, payable to order, cannot, in Virginia, maintain an action at law upon the note, against a remote endorser, but he may in equity. —3 Cranch. 311.

According to the law of Virginia, the maker of a note must be sued, if solvent, before recourse can be had to the endorser, but his insolvency dispenses with this necessity.—5 Cranch, 142, 333.

In an action, in Virginia, by the assignee of a negotiable promissory note, against the maker, the latter may set off a negotiable note of the assignor, which he

held at the time of his receiving notice of the assignment of his own note; although the note, thus set off, was not due at the time of the notice, but became due before the note upon which the suit was brought had been first due.—6 Cranch, 203.

A promissory note, given and received, for and in discharge of an open account, is a bar to an action upon the open account; although the note be not paid.—6 Cranch, 253.

A several suit and judgment, against one of two joint makers of a promissory note, is no bar to a joint action against both upon the same note.—ibid.

Whenever the holder of a bill, &c. has a remedy against several parties to it, he may commence and proceed in several actions against each of these parties at the same time; and an action commenced against one, will not preclude any other remedy against the others; but, as the different persons liable on the bill are debtors to the holder, in respect of the same debt, satisfaction by any one will discharge the others.—Stra. 515.—1 Wils. 46; but executions for costs may be issued in all the suits.—2 Dall. 115.

It is settled, that when two persons are *severally*, as well as jointly bound in a bond, and one of them be taken in execution in a separate action, the other may nevertheless be sued, because the taking of *another person* in execution, is only the mere security for the payment of a debt, and not a valuable satisfaction of it. It was made a question, in the last century, how far this doctrine was applicable to bills of exchange; but it is now settled, that a judgment, or even an execution, against the *person* of any one of the parties to the bill, will not discharge the others, though with respect to him it is a full satisfaction of the debt.—Chitty on Bills, 361.

It is also settled, that the holder's letting a subsequent endorser in execution out of prison on a letter

of license, will not discharge a prior endorser, from his liability to pay the bill; and that if an acceptor be discharged under an insolvent debtor's act, such discharge will not operate in favour of any other person; but if the holder of a bill accept a bond from the drawer, or any other party in satisfaction of it, such act will discharge other subsequent parties; and we have before seen, that compromising with the acceptor, without the assent of the drawer or endorsers, will release them from their engagements.—ibid. 362.

In an action on a promissory note for "eighty dollars, to be paid in good West India rum, sugar, or molasses, at the election of the payee, within eight days after date," it was held unnecessary to aver that the payee made his election, and gave notice thereof to the promissor; as the latter was bound, at all events, to make payment in one of the articles specified, within eight days, and on failure became immediately liable.—3 Day's Cases, 327.

An assignment of a note, made during the pendency of a suit, operates as a discontinuance of the suit.—1 Marsh. 555.

Where the drawer of a note is discharged from arrest on a *ca. sa.* (that is, an execution against his *person*) by the holder, the endorser is also discharged.—4 Dall. 275.—3 Yeates, 496.

But the endorser of a note is not discharged, by the holder's taking a mortgage from the drawer, as security for the debt.—7 Serg. & R. 219.

A. having accepted two bills of exchange for nearly the same amount, on the same day, sent his clerk to the person in whose hands both bills were, as agent of two different holders, to take up one of them; but the clerk took up the other, and brought it to A. who cancelled his acceptance. Within five minutes, however, after he had received the bill, he wrote his name again under the acceptance, and sent it back to the agent,

who received it, and gave up the other bill. *Held*, that the bill first taken up, was paid, and the endorsers discharged.—6 Serg. & R. 361. [Gibson J. dissentiente.]

The endorsement of a *sealed* note, in blank, by the payee, does not create a liability on the part of the endorser.—13 Serg. & R. 311.

A promissory note, given by one member of a commercial company to another member, for the use of the company, will sustain an action at law by the promissee, in his own name, against the maker; notwithstanding that both parties were partners in that company, and the money when recovered would belong to the company.—8 Cranch, 30.

Under the statute of Virginia, giving to debts due on protested bills of exchange, the rank of judgment debts, a joint endorser, who has paid more than his proportion of the debt, has a right to a satisfaction out of the assets of his co-endorser, with the priority of a judgment creditor.—12 Wheat. 595.

If A. lend the note of a third person to B., B. must use due diligence to recover it; and, if it be lost by his want of diligence, he must be responsible.—1 Wash. C. C. R. 230.

SECTION III.

The evidence.

The evidence which the plaintiff should adduce in support of his declaration, in which the bill, &c. is set forth, may be considered with reference to,

1. The facts which must be proved.

2. The manner of proving those facts.

With respect to the facts which must be proved, the evidence is, in all cases, governed by the pleadings, it being necessary to prove every thing put in issue, and no more.

When the general issue of *non-assumpsit* is pleaded, the plaintiff must prove every material allegation in his declaration; but on an issue taken on a special plea, replication, or rejoinder, if there be no plea of non-assumpsit, it is necessary to prove only the particular point referred to the jury; for whatever is not expressly denied, is admitted by the pleading; and on the same principle, where the issue lies only on the defendant, as where it is joined on the plea of infancy, and there is no other plea, it is not incumbent on the plaintiff to adduce any evidence in support of his declaration.—Chitty on Bills, 390.

Under the general issue, the plaintiff must prove, *First*, that the bill, note, &c. declared on, was *made*, as stated in the declaration, or that its legal operation was as therein described: *Secondly*, that the defendant became party to the bill, as alleged in the pleadings: *Thirdly*, the plaintiff's interest in the bill, as endorsee, bearer, &c. and sometimes the consideration which he gave for it: *Fourthly*, the breach of the defendant's contract.—ibid.

The *first* is proved by the production of the bill, &c. itself; and in an action against the acceptor of a bill, or endorser of a note, the hand-writing of the drawer or maker need not be proved.

Secondly, in an action against the acceptor of a bill, the plaintiff must prove that the defendant accepted the bill, either verbally or in writing; and if the acceptance were made by an agent, that he was legally authorized by the principal, for which purpose, the agent should be subpœnaed.—In an action against a *drawer* or *endorser*, the hand-writing of the defendant, or a signature by his agent, having power to contract for him, must be established in evidence; and in an action against a person transferring a bill by delivery only, the delivery by him must be proved.—ibid. 390, 1.

Thirdly, it will be incumbent on the plaintiff to prove

his interest in the bill, or, in other words, how he became party to it, in case his right be impeached by evidence on the part of the defendant.

The *payee*, or the *bearer* of a bill originally payable to bearer, has in general only to produce the bill; though, under suspicious circumstances, the bearer may be required to prove that he, or some other person, for whose use he holds the bill, &c. took it *bona fide*, and gave a valuable consideration for it.—Bayl. 116.—Peake's L. Ev. 220.

An *endorsee* must in general prove the hand-writing of the first endorser, even against an acceptor, whose acceptance was made after sight of the endorsement; and, notwithstanding that the bill was payable to the drawer's own order, and endorsed by him; and when the first endorsement was in full, directing the acceptor to pay the bill to a certain person, the plaintiff must also prove the endorsement of that person; but if the endorsement was in blank, it will be unnecessary, in an action against the acceptor, to prove any of the subsequent endorsements, although they were in full, unless such endorsements be stated in the declaration, in which case they must all be proved; but if there be a count omitting some of the endorsements, they need not be proved.—Chitty on Bills, 391, 392.

Where a bill is made payable to the order of a fictitious person, it has been decided that it will not, in an action against any party, aware of that fact, be necessary to prove an endorsement.—ibid. 392.

In an action against the acceptor, it is a general rule that the drawer's hand is admitted, because the acceptor is supposed to be acquainted with the writing of his correspondent, and, by his acceptance, he holds out to every one who shall afterwards be the holder, that the bill is truly drawn.—1 Ld. Raym. 444.—Str. 946.—1 Bin. 27.

In an action against the acceptor of a bill payable to order, the plaintiff must prove the hand-writing of

the payee or first endorser; and this, although it were on the bill at the time it was accepted.—1 Term. Rep. 654.

If the payee endorses in blank, a subsequent *special* endorsement may be struck out.—Peake, N. P. 225. —2 Dall. 147.—4 John. Rep. 27.

In an action by an endorsee against the drawer, the same rules obtain with respect to proof of the hand-writing of the endorsers, as in an action against the acceptor.—1 H. Bl. 313.

In an action by an endorsee against an endorser, it is not necessary to prove the hand-writing either of the drawer or of the acceptor, or of any endorser before him against whom the action is brought; for, by his endorsement, he virtually undertakes, to every subsequent holder, that the names of the drawer, acceptor, and previous endorsers, are really in the hand-writing of those to whom they respectively purport to belong.—1 Ld. Raym. 174.—Str. 444.—2 Burr. 675.

Where the action is by an endorser who has paid the money, proof must be given of the payment.—1 Ld. Raym. 743.

In an action on the case, by the acceptor against the drawer, the plaintiff must prove the hand-writing of the defendant, and payment of the money by himself, or something equivalent to that, such as his being in prison in execution.—3 Wils. 18.

In actions against the drawer or endorser, the protest is sufficient evidence that the bill is not paid; and the mere production of the protest is sufficient. It is not necessary to prove either the writing of the notary, or to give any account of how the plaintiff had the protest; for that would be destructive to public commerce, and throw too great a difficulty on transactions of this kind.—12 Mod. 345.—Gilb. L. E. 118.

In an action against the drawer of a bill which was

lost, it was held by Holt, C. J. that proof of the defendant's having owned that he had made the bill, was sufficient.

With respect to a promissory note, the same rules as to what is necessary to be proved, apply, as in a bill of exchange; the maker being in the place of the acceptor; the payee, after endorsement, in that of the drawer; and the endorsers and endorsees the same in each.—4 Bac. Abr. 739.

If, in an action against the drawer of a bill of exchange, the plaintiff allege that the defendant had notice of the protest, evidence of the use of due diligence in giving notice, without proof of actual notice, will not support the action.—6 Mass. 386.

Evidence that the maker of a note cannot be found, when it was due, is sufficient to support a general averment that the note was presented, and payment refused.—2 Caines' Rep. 121.

In an action at the suit of an executor, against the acceptor of a bill, on a promise laid to the testator, the plaintiff must prove that the defendant accepted the bill in the testator's life-time.—12 Mod. 447.—3 East, 409.

We have seen, that, in some cases, the plaintiff will be called upon to prove the consideration which he gave for the bill or note. (*ante.*) In an action by the endorsee of a bill of exchange, if it appear that a prior party was defrauded out of it, the plaintiff is bound to prove what consideration he gave for it.—2 Camp. 574. —1 Camp. 100. But the mere giving of a notice, that the plaintiff will be requested to prove what consideration, is not sufficient to throw the burthen upon him. Some suspicion must first be cast upon his title, by showing that the bill was obtained from the defendant, or some previous holder, by force or by fraud.—2 Camp. 596; and in the case of a bank note, unless there be a strong presumption of fraud or want of con-

sideration against him, his interest in the security cannot be disturbed.—2 Camp. 5.—13 East, 130.

Fourthly, in an action against an acceptor, we have seen, that in general it is not necessary to prove a presentment for payment (*ante.*) But where a *drawer* or *endorser* is defendant, as each is liable only in default of payment by the acceptor, the plaintiff must, in order to show the defendant's breach of contract, prove that due diligence was used to get the money from the acceptor.—2 Comyn, 579. Thus, he must, in certain cases, as when a bill is payable after sight, prove a presentment for acceptance, and in general a presentment for payment.—ante.

In an action against an endorser of a bill, it is not necessary to prove a demand of payment from the drawer.—1 Stra. 441.—Comyn, 579.—et ante.

An endorser having paid a bill, where there have been subsequent endorsements, must, it is said, prove that it was returned to him, and that he paid it,—1 Ld. Raym. 743; and where the acceptor of an accommodation bill sues the drawer, which he cannot do on the bill, &c. he must prove the hand-writing of the defendant, and payment by himself,—3 East, 169; and as the presumption of law is, that the acceptor had consideration for his acceptance, it will be incumbent on him to prove the contrary.—3 Term. Rep. 183. —et ante.

Nor is the production of a bill of exchange from the custody of the acceptor, prima facie evidence of his having paid it, without proof that it had been in circulation after it had been accepted: nor is payment to be presumed from a receipt endorsed on the bill, unless it is shown to be in the hand-writing of a person entitled to demand payment.—2 Camp. 439.

In an action by the endorsee against the first endorser, evidence is admissible to show that the note was endorsed for the accommodation of the drawer, by whom it was fraudulently put into circulation.—2 Browne, 262.

In an action by the drawer, who has been obliged to pay the bill, against the acceptor, it is necessary, in support of a special count, stating the return of the bill, to prove the acceptance, the demand of payment from him, and refusal, the return of the bill, and payment by the plaintiff: but, for the above reason, it is not necessary in the first instance, to prove that the acceptor had in his hands effects of the drawer.—10 Mod. 36.—1 Wils. 185.

The evidence which the plaintiff must adduce, considered with reference to the *manner* in which every material fact must be proved, is either *parol*, or *written;* each of which must be the best evidence the nature of the case could afford.—2 Camp. 636.

If there was a subscribing witness to a bill or note, he must, as in the case of an action on a deed, in general be subpœnaed.—ibid.

In an action on a bill of exchange at the suit of an endorsee against the acceptor, the drawer is a competent witness to prove the acceptor's hand-writing, though the defence be forgery.—4 Esp. Rep. 32.

In an action against the maker of a note, the endorser is a good witness to prove it paid,—Peake's Ca. Ni. Pri. 6, 52; and in an action on a foreign bill of exchange, to prove the hand-writing of the defendant, it is evidence to go to the jury, that a person who saw him write once, thinks the hand-writing alike; 4 Esp. Rep. 37; and a person who has received letters from the party in a course of correspondence, though he has never seen him write, will be competent to prove his hand-writing.—Peake, L. E. 102.

In an action against the drawer of a bill, the acceptor may prove that he has no effects in his hands.—1 Esp. Rep. 332.—2 Camp. 310.

The endorser of a promissory note is not a competent witness to prove the note void for usury.—4 Mass. 156.

Possession of a bill of exchange, or of an order, by the drawee, is *prima facie* evidence of his having paid it.—9 S. & R, 385.—12 ibid. 42.

On the principle, that the plaintiff must adduce in support of his action, the best evidence in his power, he must, in general, produce at the trial, the *instrument* declared on, in proof of the allegation in the special count, that it was *made.* Where, however, the original bill is wrongfully withheld by the defendant, it will be sufficient to produce a copy, or to give parol evidence of its contents; and where the defendant tore his own note of hand, a copy was admitted, as good evidence.—Ld. Raym. 731, et ante.

But in these cases, sufficient probability must be shown to the court, to satisfy them, not only of the destruction of the bill, but also that the original note was genuine, before the plaintiff will be suffered to read a copy, or give parol evidence of the contents; 1 Atk. 446; and it has been decided, that where the original note is in the hands of the defendant, the plaintiff must give him notice to produce it, or he will not be allowed to go into evidence of its loss or contents.—1 Esp. Rep. 50.—Peake, 165.

With respect to the mode of proving the plaintiff's interest in the bill, if he claim as *payee or bearer*, the mere production of the bill, containing words authorizing a transfer by *delivery*, will, as it has been already observed, be, in general, sufficient; though in certain cases, (referred to in a preceding section of this work,) he will be put to prove what consideration he gave for the instrument.

In general, in proof of notice of the dishonour of a bill having been given, it will be sufficient to show, that a letter, containing information of the fact, was put into the proper post-office; 2 Hen. Bla. 509.—9 East, 347; or left at the defendant's house.—1 Esp. Rep. 5.

In civil cases, the post-mark on the letter seems to

be evidence, of itself, of the time and place when it was put into the post-office.—2 Camp. 623.

But, to entitle the plaintiff to give such facts in evidence, he must give the defendant notice to produce the letter, which was sent or delivered.—Peake's Ca. Ni. Pri. 165.

The books of a notary-public, proved to have been regularly kept, are admissible evidence after his death, to prove a demand of payment and a notice of non-payment of a promissory note.—8 Wheat. 326.

CHAPTER VIII.

ANOMALOUS AND PECULIAR DECISIONS IN THE SEVERAL STATES.

SECTION I.

Massachusetts.

A verbal promise to accept a non-existing bill, is of no validity.—3 Mass. 1.

By the law of Massachusetts, a promissory note is not entitled to grace, unless it be expressly made payable with grace.—4 Mass. 245.

A promissory note for money, with the words ["*foreign bills*"] in brackets, at the left side of the note, which are unexplained, is not negotiable. The court will take notice, that foreign bills are country bank-notes, and different from cash in value; and they will consider those words as words of the promissor, and securing to the promissee a stipulated benefit.—4 Mass. 245.

But the case will be different, if there be evidence

that the parties had, by these words, a different design. —ibid.

An alteration of a note, by inserting a word which the law would have supplied, will not annul the contract, although it be interlined by the promissee; and, if the alteration be immaterial, the law will presume the assent of the promissor to the making of it.—6 Mass. 519.

In actions upon foreign bills of exchange against the drawer, the payee or endorsee is entitled to recover the money for which the bill was drawn, and the charges of protest, with interest at six per cent. on those sums, from the time when the bill should have been paid; and the further sum of one-tenth of the money for which the bill was drawn, with interest upon it from the time when payment of the dishonoured bill was demanded from the drawer: but nothing is allowed for re-exchange, the ten per cent. being a substitute for such re-exchange, which, by immemorial usage, controls the law-merchant.—6 Mass. 159, 162.

An English merchant, living in Manchester, in England, drew his bill of exchange, payable to himself or order in London, upon an American house, having their domicil in Boston, which was accepted by one of the house then in Manchester. This was held to be a foreign bill, and to have the same effect as if accepted by the house, at Boston, payable in London.—ibid.

Any credit by the endorsee and holder of a bill or note, to the drawer, acceptor, prior endorser, or promissor, is a consent to hold the demand upon their responsibility; and the holder has no remedy afterwards but against them, where the circumstances of the transaction have rendered them liable absolutely and at all events.—7 Mass. 494.

In Massachusetts, as the statute of Anne was never enacted there, the practice has been to declare on notes not negotiable in the same manner as if they were negotiable.—4 Mass. Rep. 245.

Where a negotiable note is given for a subsisting debt, the legal presumption is, that the note was received in payment; and, unless this presumption be controlled, must operate as a discharge of the simple contract.—6 Mass. Rep. 143.—11 ibid. 359.

But, if a note not negotiable be given in consideration of a debt due on simple contract, the same presumption does not arise, and the creditor may have his remedy on the note, or may recover on the original contract.—ibid.

The Supreme Court of Massachusetts have held, that, in case of a bill being protested for non-acceptance or non-payment, an informal notice is not sufficient, but that a copy of the protest should be given or offered to the drawer, or due diligence used to furnish him with it.—6 Mass. Rep. 386.

SECTION II.

Connecticut.

The assignee of a note cannot recover the amount of the note from the assignors, unless he can show that the money could not be recovered from the maker, either on account of the promissor being insolvent at the time of the assignment, or on account of some act of the assignors to discharge it afterwards.—Kirby, 50.

If the assignee receives part of the money from the maker of the note, the assignor is discharged.—ibid.

An agreement in discharge, made in writing, at the time of giving a note, but not annexed to the note, will operate as a condition.—Kirby, 364.

The contract made by endorsement extends to all future endorsees, even where notes are not negotiable; and an action lies in favour of an endorsee, against a remote endorser.—3 Day's Cases, 12.

Though a note be void as against the maker, as for fraud, or forgery, it may be good against an endorser,

in favour of an endorsee, who took it, relying on the endorsement.—ibid.

Where there are several endorsers of a promissory note, they are, in general, liable to each other in the order of their respective endorsements.—ibid. 512.

The endorsee of a promissory note, in attempting to enforce the collection of it by suit against the maker, is not obliged to order the attachment or execution to be levied upon property notoriously of less value than the debt, or lose his hold of the endorser to that amount. —ibid. 458.

SECTION III.

Vermont.

A verbal agreement to accept, made before the drawing of a bill, is binding on the drawers.—Chipman's Rep. 42.

If a bill be endorsed in blank, and there be a verbal agreement between the endorser and endorsee, that there shall be no recourse against the endorser, no subsequent endorsee can maintain an action against such endorser, although, at the time of endorsement, the endorsee had no notice of such agreement.—Chipman, 85.

An endorsement is prima facie evidence of an obligation on the endorser, but may be controverted.—ibid.

SECTION IV.

New York.

Although promissory notes made in Connecticut, are not there negotiable, they may be negotiated in this state, and a suit maintained on them in the name of the endorsee.—1 Caines' Rep. 412.

In an action by the bona fide holder of a negotiable note, received before due, against the maker, the con-

sideration cannot be inquired into, if the instrument be not in its creation void.—3 Caines' Rep. 279.

If the third day of grace happens on Sunday, the demand must be made on Saturday, though notice to the endorser need not be given until Monday.—2 Caines' Rep. 343.

Where the last day of grace happens to be the fourth of July, a note or bill must be paid on the third.—2 Caines' Cases in Error, 195.

An order drawn by a debtor, on a person holding funds of such debtor in his hands, is, after its exhibition to the drawee by the holder, an assignment of such funds to the extent of the order; and the drawee afterwards cannot legally part with such funds to the drawer, or any other person.—1 Caines' Rep. 379.

The terms "value received," in a note not within the statute, will not, of themselves, imply a consideration, but a consideration must be averred and proved. —3 Caines' Rep. 286.

A note made in France, but payable to a person in America, is valid in this state, though not stamped according to the laws of France.—1 Johns. Rep. 94.

Where a note was made in Jamaica, payable in New York, it was held, that the contract was to be governed by the laws of New York.—4 Johns. Rep. 285.

Where the holder of a note received part payment from the maker, after it fell due, and before calling upon the endorser, it was held, that the endorser was discharged; and a promise by him to pay the note, not made under a knowledge of a demand on the maker, and notice to the endorser, was not binding.—8 Johns. Rep. 384.

The payee endorser of a note, who has been sued by the endorsee, in default of the maker, cannot com-

pel the maker to pay the costs of such suit. The maker is liable for the amount of the note only.—9 Johns. Rep. 131.

A note payable to B., or bearer, in "York state bills or specie," is a negotiable note within the statute, and may be declared on as such.—ibid. 120.

Where a note payable on demand, was negotiated two months and a half after its date, the maker was allowed, in a suit by the holder against him, to show a part payment to the original payee, before a transfer of the note to the plaintiff.—7 Johns. Rep. 70.

There is no precise time at which such a note is to be deemed dishonoured; but it must depend on the circumstances of the case, and the situation of the parties.—ibid.

A bill drawn in New York, on Charleston, or any place in the United States, is an inland bill, on which a protest for non-acceptance or non-payment is not necessary; though a regular *notice* of non-acceptance is requisite to charge the endorser.—5 Johns. Rep. 375.

But the contrary doctrine has been maintained in the Circuit Court of Pennsylvania, Eastern District, by Mr. Justice Washington.—C. C. 1821. M. S.

The holder of a bill is entitled, in New York, to recover at the rate of exchange at the time when notice of the protest is given.—1 Paine, 156.

To put a notice of the non-payment of a note into the post-office, in the *city of New York*, directed to the endorser, who resided at *Kip's Bay*, three miles and a half from the post-office, but within the city, was held not sufficient to charge such endorser, especially as there was no post-office where the endorser resided, and the *letter carriers* did not deliver letters at that distance, and the endorser's place of residence must

have been known to the holder; and where the party resides in the same city or town, the notice must be personal, or left at his dwelling-house.—10 Johns. Rep. 490.

But, if a notice be sent to the post-office to which the party usually resorts for his letters, it would admit of no doubt that such notice would be good, although it were in a different town from that in which he resided, and were there was a post-office.—16 ibid. 218.

A promissory note, void ab initio, is not valid in the hands of a subsequent holder for a valuable consideration, and without notice.—12 ibid. 306.

The holder of a bill of exchange, drawn in New York on England, and returned protested, is entitled to recover the contents of the bill at the *rate of exchange*, or the price of bills in England at the time of the return of the dishonoured bill and notice thereof to the drawer, together with twenty per cent.—12 Johns. Rep. 17.

In an action by the endorsee against the maker of a note, the defendant will not be permitted to say that the plaintiff purchased it at a discount.—13 Johns. Rep. 52.

If the holder of a note, after the time of payment, and after a suit has been commenced against the endorser, release the maker, by writing not under seal, and without consideration, such release is void, and is no defence in the action against the endorser.—13 Johns. Rep. 87.

Where separate suits had been brought against the maker and endorser of a promissory note, and the endorser paid the amount under an agreement with the holder, that the suit against the maker should be prosecuted for the benefit of the endorser; held, that the maker could not avail himself of such payment by the

endorser, as a defence in the suit against him.—13 Johns. Rep. 353.

A note given for the use of a billiard table is not illegal, unless it appear that the person to whom it was given kept a tavern, or that it was for money won at play.—13 Johns. Rep. 85.

Where a bill or note is valid, as between the drawer or maker, and the payee, so that the latter can maintain an action on it against the former, it is valid also in the hands of an endorsee, who has discounted it at a higher rate than the legal rate of interest; and he may recover the full amount of the bill or note against the maker or acceptor.—15 Johns. Rep. 74.

But the holder of a bill or note, purchased at a greater discount than the legal rate, can recover from his endorser, only the amount which he had actually advanced.—ibid.

A bill or note, drawn for the purpose of being discounted at a usurious rate, and endorsed for the accommodation of the maker or drawer, is void in its original formation.—ibid.

A promissory note given for a wager, on the event of an election of governor, is void, on principles of policy; and, where such a note was transferred after it became due, it was held that the endorsee took the note subject to all the defence existing against it in the hands of the original payee.—8 Johns. Rep. 454.

In an action by the payee of a bill of exchange, against the acceptor, when the bill is drawn *payable at a particular place*, and accepted, it is not necessary for the plaintiff to aver or prove a demand of payment at the time and place appointed; but the defendant, if he means to avail himself of the want of a demand, must plead that he was ready at the time and place appointed, to pay, but that the plaintiff did not come there, &c.; which defence goes only to the damages

and costs, and not to the cause of action.—17 Johns. Rep. 248.

The protest of a promissory note is no evidence by itself; the demand and notice must be proved, as if no protest had been made.—1 Anthon's Nisi Prius.

SECTION V.

New Jersey.

A proper assignment must be written over an endorsement of a promissory note, before the endorser can lawfully recover.—Penning. 87.

SECTION VI.

Pennsylvania.

By the construction given to a particular statute, the endorsee of a promissory note takes it subject to all equities between the original parties, whether endorsed before or after it became due.—1 Dall. 441.

But, by a subsequent statute, it is provided, that notes bearing date in the city or county of Philadelphia, payable to the order of the payee, for value in account, or for value received, and in the body of which the words "without defalcation," or "without set off," are inserted, shall be held by the endorsees discharged from any claim of defalcation or set-off by the drawer or endorsers thereof; and the endorsees shall be entitled to recover against the drawer and endorsers, such sums, as on the face of the notes, or by the endorsements thereon, appear to be due.—Act of 27th Feb. 1797.

The case cited in 1 Dallas, 441, "though never overruled, has always been regretted."—Per Tilghman, C. J. in 12 Serg. & R. 265: and see 8 Serg. & R. 483, and 9 Serg. & R. 196.

The consideration of a note payable "without defalcation", cannot be inquired into by a bona fide holder,

against the drawer, though the note be not dated in the city or county of Philadelphia, nor discounted by a bank, nor deposited in a bank for collection.—9 Serg. & R. 193.

A promissory note, deposited for collection in one of the banks of Pennsylvania, incorporated by the act of 21st of March, 1814, and becoming due, but not being *drawn payable* at such bank, is, by the true construction of the eighth section of that act, not liable to defalcation.—8 Serg. & R. 481.

The author of this work has no hesitation in saying, that, at the present day, no defalcation would be allowed, on any promissory note, negotiable according to the custom of merchants, in an action brought by a bona fide holder, without notice; against the maker.

By an act of the legislature, 30th March, 1821, it is enacted:—

Sect. I. Whenever any bill of exchange, hereafter to be drawn or endorsed within this commonwealth, upon any person or persons, or body corporate, of or in any other state, territory, or place, shall be returned unpaid, with a legal protest, the person or persons to whom the same shall or may be payable, shall be entitled to recover and receive of and from the drawer or drawers, or the endorser or endorsers, of such bill of exchange, the damages herein after specified, over and above the principal sum for which such bill of exchange shall have been drawn, and the charges of protest, together with lawful interest on the amount of such principal sum, damages, and charges of protest, from the time at which notice of such protest shall have been given, and the payment of said principal sum and damages and charges of protest demanded; that is to say, if such bill shall have been drawn upon any person or persons, &c. of or in any of the United States or territories thereof, excepting the state of Louisiana, five per cent. upon such principal sum: if upon any person, &c. of or in Louisiana, or of or in any other state or

place in North America, or the islands thereof, excepting the north-west coast of America and Mexico, or of or in any of the West India or Bahama islands, ten per cent. upon such principal sum: if upon any person, &c. of or in the island of Madeira, the Canaries, the Azores, the Cape de Verd islands, the Spanish Main or Mexico, fifteen per cent. upon such principal sum: if upon any person, &c. of or in any state or place in Europe, or any of the islands thereof, twenty per cent. upon such principal sum: if upon any person, &c. of or in any other part of the world, twenty-five per cent. upon such principal sum.

SECT. II. The damages, which by this act are to be recovered upon any bill of exchange, shall be in lieu of interest, and all other charges, except the charges of protest, to the time when notice of the protest and demand of payment shall have been given and made, as aforesaid; and the amount of such bill, and of the damages payable thereon, as specified in this act, shall be ascertained and determined by the rate of exchange or value of the money or currency mentioned in such bill, at the time of notice of protest and demand of payment, as before mentioned.

Where more than legal interest is included in any specialty, or note, the whole amount cannot be sued for and recovered; but the plaintiff is entitled to a verdict for the just principal and interest.—2 Dall. 92.

SECTION VII.

Maryland.

An action of debt will not lie in Maryland on a promissory note.—1 Cranch, 345.

In an action on a bill of exchange, a duplicate protest of the bill may be given in evidence, without producing and proving the original bill, if it be proved that the original bill was lost after protest.—2 Har. & M'Hen. 457.

By the statute of Maryland, of 1763, ch. 23, which is perhaps only declaratory of the common law, an endorser may tender to a plaintiff the amount of a judgment which he has recovered against the maker of a note, and obtain an assignment of it.—3 Wheat. 520.

SECTION VIII.

Virginia.

The bank of Alexandria may maintain an action against the endorser of a promissory note, negotiable in the bank—the endorsement being for the accommodation of the maker, and the maker being solvent, without instituting a suit against the maker. The consideration, moving from the bank to the maker of the note on the credit of the endorser, charges both the maker and the endorser.—5 Cranch, 49.

In *Virginia*, the maker of a promissory note must be sued, if solvent, before the endorser can be resorted to. But, if the maker be insolvent, it is not necessary to bring a suit against him.—5 Cranch, 142.

Whether the maker of a promissory note be insolvent, is to be left to the jury, as a question of fact, in an action against the endorser, no suit having been brought against the maker.—ibid.

In *Virginia*, a right exists in the holder of a promissory note, at least where he cannot obtain payment at *law*, to sue a remote endorser in *equity*.—5 Cranch, 322.

The remote endorser has the same defence in equity against a remote endorsee, as against his immediate endorsee; and a remote endorser, defendant, has a right to insist on the other endorsers being made parties to the bill.—ibid.

On a draft payable out of a particular fund of money in the drawer's hands, belonging to the payee, the payee may maintain an action against the drawer, in case of the drawee refusing acceptance.—6 Munf. 3.

The holder of a negotiable note, who gives further time to, or enters into a new contract with the drawer, does not thereby discharge the endorser.—Gilmer, 305.

SECTION IX.

North Carolina.

Promissory notes are not negotiable under the act, unless for the payment of money only.—Martin, 76.—2 Hayw. 150.

If the assignee of a negotiable paper leave notice of a defence by the maker, he is liable to that defence at law.—1 Hayw. 369.

The strict rule of the English law, respecting notice of non-payment of bills, has not prevailed in North Carolina. What shall be reasonable notice, depends on the local situation, and respective occupations and pursuits of the parties.—2 Hayw. 332.

The rule requiring notice, does not apply to paper not negotiable.—2 Hayw. 107.

But, in the case of paper not negotiable, the holder must apply in a reasonable time, and give notice of non-payment in a reasonable time, otherwise he must bear the loss.—1 Taylor, 67.

An order to pay money, is, in the hands of the drawee, evidence of payment: but it is otherwise of an order to deliver goods.—1 Taylor, 110.

SECTION X.

South Carolina.

A note for payment of *goods* or *property*, is not within the statute 3 & 4 Anne, or the act of assembly of 1799,—1 Nott & M'C. 254.

The endorser of an instrument for the delivery of *goods*, is not liable to an action, on the ground of the

insolvency of the maker, without an express stipulation.—1 Nott & M'C. 261.

A note for a certain sum, "paper medium," is not assignable under the act of assembly, so as to enable the assignee to sue in his own name.—1 M'Cord, 115.

An endorsee of a note, who receives it after it has become due, takes it on the credit of the endorser, and is liable in the same manner as the original payee.—1 Bay, 249.

The same demand and notice are required when a note is endorsed *after* it becomes due, as in the case of an endorsement before.—2 Nott & M'C. 283.

Although the payee of a note may restrain its negotiability, yet a subsequent holder may give it currency and negotiability, as between himself and any subsequent endorsee.—1 Bay, 160.

In all cases, the holder of a bill must give reasonable notice to the endorser.—1 Bay, 177.

Constructive notice, arising from the insolvency of the maker, is not sufficient.—2 Bay, 217.

The payee of a promissory note may commence an action against the maker on the third day of grace.—1 Nott & McC. 440. [By three judges against two.]

Where a man draws a bill on himself, no damages are recoverable.—2 Bay, 377.—1 Rep. Con. Ct. 107.

The *lex loci* where a bill was drawn, furnishes the rule both for interest and damages on the bill.—2 Hayw. 280.

The law with respect to inland bills of exchange, applies to checks upon a bank.—2 Nott & M'C. 251.

A bill of exchange, drawn by a person in Charleston upon another in New York, is a *foreign* bill, and, if not protested for non-acceptance, though notice be given of its dishonour, the holder cannot recover against the endorser.—1 Rep. Con. Ct. 100.

Under the law of South Carolina, when a bill drawn in that state upon a person residing in any other of the United States, is protested, the holder is entitled to ten per cent. damages, though the bill be not returned back to South Carolina.—4 Yeates, 19.

But where such bill is given only as an additional security to a bottomry bond, no damages are recoverable.—ibid.

SECTION XI.

Kentucky.

It is essential to a bill of exchange, that it involve the personal responsibility of the drawer, and be not payable out of a particular fund. An order drawn payable out of a particular fund, is not a negotiable bill.—1 Bibb, 490, 503.

But if the fund be certain, and be described only as a means by which the drawee is to be indemnified, the bill is good.—3 Marsh, 184.

Any written promise, to pay or return money unconditionally, is a promissory note: therefore, a paper signed by the defendant, stating that he had received a certain sum which he would return when called for, is a promissory note.—3 Nott & M'C. 585.

After a note has been negotiated at a bank, the consideration thereof, while the property of the bank, cannot be questioned by the maker.—3 Marsh, 430.

A bill thus discounted, is to be considered as a foreign bill, notwithstanding that all the parties reside within the state.—2 Litt. 43.

An inland bill of exchange, which has been discounted by the Farmers' and Mechanics' Bank of Lexington, is, by the charter of that bank, put on the footing of a foreign bill of exchange, as to the mode of recovery and right of action.—2 Litt. 16.

Under the act of 1798, the bank may maintain a

joint action against the drawer and surviving endorsers, (where one has died) of an inland bill discounted by them.—ibid.

A note *negotiable* at bank, is a mercantile paper of the character of a bill of exchange, and need not be protested to subject the assignor; but a note merely *payable* at bank, and not negotiated there, does not assume the character of a bill.—1 Marsh, 540.

One joint endorser, who has paid the whole amount of a note negotiable at bank, cannot recover from another joint endorser his contribution, without proving the insolvency of the drawer.—3 Litt. 386.

A note for the payment of a certain quantity of tobacco, at a certain price per cwt. is a note for the payment of money, and, though not sealed, has the effect of a specialty, under the act of assembly.—3 Marsh. 284.

No set form of words is necessary, in the assignment of an assignable note under the act of assembly.—3 Marsh. 292.

The assignor of a note is not liable to an action by the assignee, though the maker has taken the insolvent debtor's oath, and surrendered a schedule, unless such schedule be produced, and the amount of property delivered, ascertained. The assignee is bound to pursue the property.—3 Marsh. 60.

A remote assignor of a promissory note, is not liable to an action by the holder.—ibid. 165.—Hard. 218.

If the maker of a note be alive at the time of its falling due, his insolvency does not absolve the holder from showing that he has used due diligence to obtain the amount from him.—2 Marsh. 256.

A notice of protest needs not state who was the holder of the bill.—1 Litt. 194.

Notice of the protest of a note negotiated in bank is good, if given on the day after protest, although the parties may reside in the same town where the bank is. —3 Marsh. 264.

A remote assignor of a promissory note, is not liable to an action by the holder.—3 Marsh, 165.—Hard. 218.

The statute of Kentucky, giving the holder of a bill of exchange a *joint* action against the drawers and endorsers, does not extend to the case of a bill drawn by persons residing in one of the United States, upon others residing in another state.—1 Marsh, 454.

Where the endorsee of a bill in an action against the endorser, relies on the want of funds of the drawer in the hands of the drawee, instead of due notice, it is necessary for him to aver that fact in the declaration. —2 Litt. 185.

Where a note has been negotiated at bank, the drawer and endorser may be sued in one action.—3 Marsh, 263.

Where a bill of exchange is drawn by one citizen of Kentucky, upon another citizen of that state, although payable in another state, the holder is not entitled, upon protest, to ten per cent. damages.—3 Marsh, 488.

SECTION XII.

Louisiana.

A bill drawn in New-Orleans, upon Philadelphia, is a foreign bill.—Lownsdale v. Brown, C. C. S. U. S. P. Oct. 1821.

CHAPTER IX.

CARRIERS.

SECT. 1. Who are considered to be carriers, under that term.

2. Conveyance of persons.

3. Conveyance of goods; and first, of the extent of liability at common law.

4. Liability.—How restrained by the act of parties or otherwise; and herein of the effect of notices.

5. What acts shall be a discharge of this liability.

6. Miscellaneous duties connected with the contract.

7. Of freight, porterage, warehousing, and wharfage.

8. Property in goods, when and in whom vested.

9. Stoppage in transitu.

10. Penalty for carrying letters.

11. How far a carrier stealing goods, is guilty of felony.

SECTION I.

Who are considered to be carriers under that term.

1. *How far any one carrying goods, whether by agreement or by hire, or not.*

The Law of Carriers is founded on the universal rules of commercial policy, and finds a place in the internal administration of almost every civilized government. Its usages are singularly consistent, in the most remote, as well as in the most refined states of the world. In England, and the United States, the laws relating thereto, as they now stand, are deduced chiefly from what is denominated the Common Law, or those customs which have been handed down from the rudest periods, and corroborated by the practice of every succeeding age. How far the courts of judicature have promoted or diminished the commercial security, which our ancestors thought fit to establish, by relaxing the severity of former obligations; or how far a refinement in jurisprudence, or an advanced state of moral efficacy, warrants these invasions, of the common law, are questions irrelevant to the purpose of this treatise.

The law has avowedly given the privilege of its special protection, in respect of the trader, and not the

carrier. On this ground, therefore, it has been determined, that any person undertaking, for hire, to carry the goods of *all persons indifferently*, is, as to the liability imposed, to be considered a common carrier.—1 Salk. 249.

No special agreement for the amount of the hire, is essential, to constitute this relation.—Cro. Jac. 262.

Freighters for hire upon navigable rivers are to be considered common carriers, and subject to their liabilities.—1 Murphey, 417. *North Carolina.*

A boatman is a common carrier, and liable as such for all losses, except such as arise from the act of God or public enemies.—2 Nott & M'C. 88. *South Carolina.*

But in *North Carolina*, it has been decided, that "to render a man a *common carrier*, he must make the carriage of goods his *constant employment;* that by which he obtains his livelihood." One employed *pro hac vice*, though for a reward, is not liable as a common carrier. —1 Hayw. 14.

A carrier may demand as much as is reasonable, which the other is bound by law to pay; and the carrier cannot set up the want of such agreement, to exempt himself from the common law responsibility. —"An action on the case lies upon this matter, without alleging any consideration; for the negligence is the cause of action, and not the assumpsit."—Hence, the obligation seems to arise, more out of a public duty, than the particular consideration, and the character to be determined from the general nature of the undertaking.

But where a person specially undertakes to carry goods, and they are injured by his neglect or mismanagement, the agreement and promise being broken, will give a sufficient cause of action, although no person could have compelled him to undertake the charge. —1 Roll. Abr. 10. For the pretence of care being the persuasion, which induced the other to trust him,

the negligence has put a fraud upon, and is a deceit to the bailer.—Selw. N. P. 363. In this respect, the only difference between a common carrier, and a private person undertaking the carriage of goods, is, that the former is obliged to undertake the charge, which the latter is not compellable to do: the former is responsible for injuries arising out of acts against which he could not provide; a liability at common law, to which the latter is not subject. But both are equally answerable for a misfeazance.

2. *Hoymen, &c. whether masters or part-owners, barge-owners, wharfingers, or ferrymen.*

Hoymen, by the custom of England, are bound to keep and to deliver goods safely, for their hire is also due by custom.—1 Roll. Abr. c. 2. 15; and that too where every possible precaution has been taken to prevent accident, or its subsequent effects.—1 Wils. 281.

In these persons, also, every act is considered a negligence, which the law does not excuse.

With respect to the master, although he receives his salary from the owners, it does not effect or annul his common law liability, if he does not keep the goods delivered into his custody, safely.—1 Ventr. 190, 238. —2 Lev. 69.

With respect to the owners, although, in truth, they do not themselves enter into the undertaking, they are yet liable, as well in respect of the freight receivable, as also for appointing the master, whom they may select and control.—2 Salk. 439.—3 Lev. 258.—Carth. 52.

The words of a bill of lading "dangers of the river only excepted," signify the natural accidents incident to that navigation; not such as might be avoided by the exercise of that discretion and foresight which are expected from persons in such employment.—1 Murphey, 417. *North Carolina.*

Where a common carrier pays damages for the loss

of goods by negligence, &c. it is tantamount to a safe delivery, so far as to entitle him to his freight..—1 Bay, 101.

An action lies equally against a common bargeman, without any special agreement, as against a carrier upon land.—Cro. Jac. 330.—Hob. 18.

So, a ferryman, if, by overloading his boat, any injury arise, is liable for such default or negligence; and it seems that he will be excused only where the case falls under the exception of loss by perils of the sea.—5 Bur. 2825.

So, wherever an action on the case lies against a common land-carrier, it lies also against a wharfinger: "it is impossible to make a distinction between them." —ibid.

The carrier or lighterman will be responsible for a breach of his implied undertaking, although he should give notice, "that he will not be answerable for *any* loss or damage, unless occasioned by want of ordinary care in the master or crew of the vessel, in which case he will pay ten per cent. on such loss or damage, so that the whole does not exceed the value of the vessel and freight;" because the object of such notices, is to limit the responsibility of the carrier in those cases only, where the *law* would otherwise have made carriers answerable for the neglect of *others*, and for *accidents* which it might not be within the scope of ordinary care and caution to provide against.—8 Term Rep. 531.

The measure of damages, where goods are embezzled, or lost, during the voyage, is the clear net value of goods of like kind and quality, at the port of delivery.—8 Johns. Rep. 213. *New York.*

But in *Tennessee*, it has been decided, that, in an action against a carrier by water, the value of the goods at the port of reception is the proper measure of damages, unless some fault or misconduct on the part of the carrier should require the application of a different rule.—4 Hayw. 114.

It has lately been determined, that the commander of a king's ship, bringing home bullion at the usual freight, is liable to an action, for not carrying it safely and delivering it; although this seems more upon the implied contract, than from any common law liability.—4 Taunt. 787.

If a merchant lades goods on board a ship, to be transported at a reasonable reward of freight, to be paid to the owners, and in the night time, while the ship rides in the river Thames, notwithstanding a competent number of men are left on board for the guard of the ship and goods, several persons, under the pretence of pressing seamen, seize on the men on board, and take away the goods, an action will lie against the master: for, in effect, he is paid by the merchant; the merchant pays the owners, and the owners pay the master, so that the money of the merchant is only handed over by them to the master.—1 Bac. Abr. 555.

Where a vessel was sailing up the Hudson, and being near the shore and about to tack, the wind suddenly failed, and the headway under which she was, shot her on the bank; it was held, that the failure of wind was the act of God, and excused the carrier, there being no negligence on his part.—6 Johns. Rep. 160.

Where goods laden on deck are thrown overboard for the preservation of ship and cargo, the carrier is not liable.—1 Caines' Rep. 43.

In an action brought against a common carrier by water, charging the defendant with negligence, it was held to be no defence, "that the ship was tight, when the goods were placed on board, but that a rat, by gnawing out the oakum, had made a small hole, through which the water gushed;" on the ground, that whatever was not excused by law, was to be deemed a negligence in the carrier, and that he was answerable, at all events, except where the goods were damaged by the act of God, or the king's enemies.—1 Wils. 281.

So, where the proprietors of the Trent navigation,

had undertaken to carry goods from Hull to Gainsborough, and the vessel on board which the goods were placed, drove against an anchor in the river Humber, and sunk; it was held, that the carriers were responsible to the owner of the goods for the damage sustained; although it was proved that the accident was occasioned by the negligence of the persons on board a barge in the river, who had not put a buoy out, to mark the place where the anchor lay: the court observing, that there was a degree of negligence in the master of the vessel also; for, his not seeing the buoy, ought to have put him upon inquiring more minutely about the anchor; and, even if there had not been any actual negligence, yet negligence in law was sufficient. —3 Esp. N. P. C. 127.

A carrier by water is liable for an accident arising from an unforeseen nuisance in the navigation.—3 Esp. 123.—Abb. on Ship. 256.

Where there is an exception in a charter-party, of "perils of the sea," a loss from the ship's running foul of another by misfortune, is within the exception, and is a loss by the perils of the sea.—3 Esp. 67.

The plaintiffs shipped goods on board a steam-vessel. The bill of lading contained the usual exceptions of the act of God, &c. &c. On the evening before the vessel was expected to set out, the boiler was, according to custom, filled with water, but, in consequence of the action of frost, a pipe communicating with it burst, and the water, escaping into the hold, damaged the goods. In an action against the owners, it was left to the jury to say, whether or not, in leaving the boiler filled with water in frosty weather, the owners had been guilty of negligence. They found for the plaintiffs, and the court refused to disturb the verdict.—1 M. & P. 561.—4 Bing. 607.

The man who undertakes to transport goods by water for hire, is bound to provide a vessel, sufficient, in all respects, for the voyage, well manned, and furnished with sails, anchors, and all necessary furniture

and, if a loss happens, through a defect in any of these respects, he must make it good.—4 Binn. 127.

In an action against a common carrier by water, to recover damages for the loss of the plaintiff's goods, where the defence is, that carriers by water are, by the custom of the country, answerable for such losses only as are occasioned by their own negligence, the defendant cannot give in evidence, that in a case in which the plaintiff had carried the property of others, he had refused to make compensation for a loss.—2 Binn. 72.

It seems, that the liability of carriers on *land*, is the same here as in England; but, with respect to carriers on the internal rivers, a different rule prevails, or ought to prevail.—"Unless a custom or usage be most clearly established to the contrary, I should think that the carrier was liable for every accident, which skill, care, or diligence could have prevented."—Per Tilghman, C. J. 8 S. & R. 533.

If there be a want of sea-worthiness, it renders the carrier liable, although the loss does not proceed from that cause; but if it appear, from the facts, that the loss may be fairly attributed to *inevitable accident*, the burthen of proof of unseaworthiness lies on the owner of the goods.—4 Binn. 127.

Where, however, a vessel founders, the carrier must prove that she was sea-worthy, before he can bring himself within the excuse of its being the act of God. —ibid.

A hoyman is not discharged by delivering the goods to a wharfinger, whose wharf he uses, but continues to be liable until they are received by the party.—2 Esp. 693.

3. *Stage-coachmasters—when a price is paid for carriage—when the owner is present.—Coachmen.—Hackney-coachmen.*

Coachmasters have been considered not to fall within the description of common carriers; 1 Salk. 282; or to be liable, as such, unless where they receive a

distinct price for the carriage of the goods; nor can a gratuity given to the drivers bring the masters within the custom, for that is not within the execution of the authority given to them by their employers.—2 Show. 127.

Where, however, a coachman or driver takes money indiscriminately for carrying goods, he is, for that purpose, a carrier, whether the goods belong to a passenger or a stranger; and he will then be in the same situation as a common carrier.—4 Esp. 177.

So, where the custom prevails of charging for overweight, it seems that the coachmasters become also liable; for, to the extent charged for, they are common carriers, and the owner of the goods being present, will neither alter the responsibility of the master as a carrier, nor, on the other hand, deprive him of the benefit of a public notice, limiting such responsibility.—ibid.

So, a hackney coachman is not chargeable as a carrier, for a passenger's goods, unless under a special agreement; and then, it is doubtful whether he ought not to be charged in respect of such agreement, rather than on the custom: and the reason of this seems to be, that his employment is intended more for the convenience of persons than for the carriage of goods; and so they are within neither the definition of a common carrier, nor the policy of the regulations instituted concerning them.

Where a parcel is delivered to a driver of a stage-coach to be carried, the master, and not the servant, is responsible.—2 Stark. 82.

4. *Postmasters, for bills lost.—For non-delivery of letters.—Exceptions.*

With respect to the postmaster-general, as no analogy whatever holds, between him and a carrier, so there is no other ground for rendering him liable for the loss of letters, or their contents, by the negligence of those employed by him.—1 Salk. 17.—Ld. Raym. 646. He enters into no contract, either expressed

or implied; receives no hire; the post-office department is a branch of the public revenue, and a branch of police, created by act of parliament in England, and by act of congress in the United States, each office governed by a different officer: and, what in a common carrier, would be only a breach of trust, is in him, in England, declared by statute to be a capital felony, and in the United States an offence punishable by imprisonment for a term not less than ten, nor more than twenty-one years. For any fault of *his own*, however, a post-master is clearly liable, but not for any negligence or misconduct of any inferior officer. The latter, offending in the business of his office, would be liable civilly for any injury thereby sustained.—3 Wils. 443.—2 Bl. Rep. 906.

5. *Intermediate carriers employed; and herein of the liability of partners.*

Carriers are often necessarily employed to connect different lines of conveyance for goods by land or water, and their liability to answer to the owner for any injury to goods, sustained by negligence or accident, while under their charge, depends on the fact of their being independent carriers, or only subsidiary to the undertaking of the carrier, who, originally, contracted for the safe conveyance of the goods. There being no privity of contract, between the owner and such third persons, to whom the carrier originally employed, may, for the sake of convenience, or necessity, transfer them; unless the liability of such person continued, the owner would be without remedy. In that case, it would also be necessary to raise as many implied contracts, as there were intermediate agents, through whose hands the goods might pass before they arrived at their destination; whereas, these can, in fact, be considered only as servants or agents of the original contracting carrier.—2 Esp. N. P. R. 693.

The only case, in which an implied contract between the owner and such third person employed, can be raised, is, where, by the particular terms of the first

contract, the duty, and, consequently, the responsibility, of the carrier, terminates at a particular point: for then, the delivery and receipt of the goods from the carrier to such third person, is sufficient to raise an implied contract, on his part, to take care of, or deliver safely, such goods, according to the direction; and, for the breach of this implied contract, an action will lie against him.—5 J. R. 389.

When, therefore, goods are transferred from the original contracting carrier, his liability continues, if such transfer is only accessory to the discharge of his own duty, or the terms of his own contract; and all such intermediate persons employed, are regarded only as his agents,—as porters, wharfingers, warehouse-keepers, &c.; and, in that case, his liability continues until the goods are actually delivered.—ibid.

But, where his own undertaking or duty is complete and ended, and the goods have passed, according to the directions, out of his hands, the owner must look to such third persons for a due discharge of all the duties incident to their relative situation; as, in the case of intermediate, independent carriers or shippers, receivers, wharfingers, &c., on the delivery of the goods to whom, the contract, on the part of the carriers, is entirely determined.—ibid.

At what particular time, the liability of these persons commences, and to what extent, will be considered hereafter.

Where A. agreed with B., a common carrier, for the carriage of goods, and B., without the direction of A., agreed for the carriage with C., who, without the knowledge or direction of A., agreed with D., a third carrier, it was held, that A. might maintain an action against D., for not delivering the goods, and that by bringing the action, he affirmed the contract made with him by C., and could not afterwards recover from B. —6 Binn. 129.—6 S. & R. 439.

A. and B. are partners in the business of public carriers; by contract between them, A. finds horses and

drivers for certain stages, and B. supplies them for the remaining stages. Notwithstanding this division of the contract between them, they are responsible for the misconduct and negligence of their drivers and servants throughout the whole distance, and it is no defence to B., that the servant by whom an injury is committed, was the *special* servant of A., and hired and paid by A. alone.—Holt, 227.—1 Stark, 272.

If a party recover damages *in case* against one of two joint proprietors for an injury sustained by the negligence of their servants, such proprietor may maintain an action against his co-proprietor for contribution, if he prove at the trial that he was not personally present when the accident happened.—2 C. & P. 417.

Where A. the keeper of a coach-office, and a part owner in several coaches, made a contract with B. for the carriage of parcels which he was in the practice of sending from that office to various places: Held, that this bound the owner of all the coaches in which A. was a part owner, and as well those who became partners after the making of the contract, as those who were so before.—5 B & C. 504.

SECTION II.

Conveyance of persons.

1. *Payment of fare.—When demandable.*

If a person take his place in a stage-coach, and pay at the time only a part of the fare as a deposit, the proprietor is at liberty to fill up his place with another passenger, if the first party be not at the inn, ready, when the coach sets off.—1 Esp. N. P. R. 27.

But, if at the time of taking his place, he pays the whole fare, the proprietor cannot dispose of his place, for the passenger may take it at any stage of the journey he thinks proper, and which may be most convenient to him.—ibid.

Where the owner of a post-chaise has permitted any

one to get into the chaise, and have his luggage fastened on, he cannot afterwards refuse to go the journey, if the hire be tendered to him; for it is such an inception of the contract, that he is bound to go through with it. —ibid.

The owner of a stage-coach is not within 3 Car. I. c. 1. or 29 Car. II. c. 7; and therefore an action may be maintained against him for neglecting to take a person who had engaged a place on a Sunday.—7 B. & C. 96.

2. *Where the contract to carry ends.*

If the usual place of alighting be in the *inn-yard*, it has been decided that passengers cannot be compelled to get down even at the inn-gate-way: *a fortiori*, (for a stronger reason) the proprietors are bound to carry them to the place to which they profess their coach to go, and cannot refuse to proceed at any intermediate stage: and, in case of accident, they would be bound to provide another conveyance, for their undertaking is absolute.—1 Camp. 167.

So, if there be a general usage to allow certain intervals for refreshment, they cannot vary, at their pleasure, those usages which are perhaps a reason for preferring their conveyance to the less convenient arrangement of other proprietors. But, if a coach-man refuses to wait, and actually leaves a passenger behind, without good cause, it seems that the latter would have a remedy, either in withholding the remainder of the fare, or, if that has been all paid, by an action on the case, for breach of the positive contract; viz. to convey the party to such a place, at such a time; and might recover any further damage sustained by the detention. —ibid.

3. *Luggage.*

It has been seen, that a distinction was formerly drawn between stage-coach owners, and carriers strictly such, and that unless the former took upon themselves

the general duties, they could not be fixed with the common law liability of the latter; and doubtless, where a proprietor of a coach holds himself out to the public as only engaging for the personal conveyance of passengers, and refuses to allow his coach to be a conveyance for goods in general, the courts would uphold the former decisions which laid down the distinction. —1 Salk. 182.—2 Bos. & Pull. 419.

But, inasmuch as a distinct price is now usually made for carriage of goods, and an additional charge is imposed on all passengers, for their luggage, above a certain weight, it may be affirmed, that, in almost every case, the proprietors would be considered as falling within the description of common carriers.—ibid.

However such luggage may be thought to be, in some degree, under the immediate care of the owner, yet it has been said, that his presence cannot absolve the carrier from his duty or responsibility, inasmuch as the care of the owner amounts only to this; that it is much more for his interest to preserve his property, than that he should be put to the trouble of suing the carrier to recover the value, which cannot be duly estimated, or the owner recompensed in pecuniary damages.—4 Esp. N. P. R. 177.

So, it has also been decided, that, when the coach-owner is liable as a carrier, he is entitled also to avail himself of a general notice, limiting the extent of that responsibility; there being no difference in this respect, whether the goods are the luggage of a passenger present with them, or are sent by a stranger to be carried for a distinct price.—ibid.

4. *Lien for fare, on luggage.*

From the preceeding liability of the proprietor, necessarily arises, from the very definition of lien, a right to detain the luggage of a passenger, until satisfaction is made for the duty which has been performed; and that, whether considered as an independent bailment of goods to be carried, or only accessory to the person. —Jeremy on Carriers, 25.

We shall hereafter show its existence and extent in the former case; but, if the carriage of the luggage be only incidental to the agreement for conveyance of the person, although it might appear, that, as there had been no contract on the subject matter, there could be no right of detaining the subject out of which no charge arises; yet, both justice and policy require, that this right should exist in one case, as well as in the other; and, as it has been decided. (2 Camp. 631;) that a master of a ship has a lien for passage-money on the luggage, as for recovery of freight, the same rule would doubtless be judicially upheld in cases of personal conveyances by land; a rule which seems to have been constantly recognised in practice.—ibid.

5. *Negligence.—What, evidence of.—When, liable for.—Inevitable accident.*

The rule, that carriers shall be liable in all cases where any injury is sustained, except where it arises from the act of God, or the enemies of the State, does not apply to the case of the carriage of persons; that regulation being intended for the prevention of fraud or collusion, which they might be tempted, from the facilities afforded by their situation, to commit, or against which they ought to protect themselves, cannot apply in cases of this nature.—Jeremy on Car. 26.

But the slightest degree of negligence in the driver, will make the principals liable; and it will be sufficient evidence to maintain such an allegation in the declaration, if the accident arose from any act of such their servant, in itself unlawful, or contrary to the acknowledged custom of the road, or from rashness, or want of proper skill in driving, as in some of the following instances:—

If the driver, with or without the knowledge of the owners, take up more passengers than are allowed by law, (for some countries have thought proper to legislate upon this subject,) and an injury ensue, which is laid in the declaration as having arisen from such over-

loading, the proof of there having been an excess of number beyond what is allowed, will be conclusive evidence that the accident arose from that cause.—4 Esp. N. P. R. 259.

So, also, if there be no excess of number of passengers, yet if the number be actually beyond the strength of the carriage, the proprietors will be liable to an action for any damage thereby sustained.—2 Camp. 79.

The penalty in the former case, arises from an infringement of the positive regulations of the statute: the damages in the latter, from a breach of the implied contract, that the proprietors will provide a safe and adequate carriage for the number that they take up.—ibid.

If the driver go so close to the side of the road, that, for want of sufficient room, an accident occurs, the principals are liable.—5 Esp. N. P. R. 273.

So, if there be any danger on the road, the driver is bound to give the passengers notice thereof—as, in going under a gate-way, &c.—and he must do that to a sufficient extent, to give them an option of proceeding or not; otherwise, the jury may consider it such negligence in the driver, as to make his principals liable in damages for any accident that may happen.—1 Camp. 167.

Where, however, the injury appears to have arisen from unforeseen accident or misfortune, the owners cannot be made responsible, although this is always matter for a jury to decide upon, and will not be presumed.—2 Esp. N. P. R. 583.

It cannot, indeed, be laid down as a certain rule, nor does public convenience require, that the driver is, under all circumstances, bound to keep on the left, or what is considered the proper side of the road. It is sufficient, that, by using previous care, no injury would have arisen, unless occasioned by unforeseen misfortune, notwithstanding that the danger might have been

avoided, if the carriage had been on its own side of the road.*—ibid.

There is no distinction between mails and other coaches, in this respect.—Peake, N. P. R. 80.

But, where there is no other carriage on the road, the driver may keep in the middle of the road, and is not bound to keep on the left-hand side, even though the accident might have proceeded from the coach not being on the proper side.—2 Esp. 533.—2 Camp. 79.

Coach-owners are not liable for injuries which passengers may sustain from inevitable accidents, as from the over-setting of the coach from the horses taking fright, there not being any negligence in the driver; but it is otherwise, if there be negligence in the driver. —2 Esp. N. P. C. 533.

A. a stable-keeper, let to B. four horses, to draw B's carriage from C. to D. The horses were ridden by A's servants. Through their negligence, the carriage of J. S. sustained an injury. It was held, that J. S. might maintain an action against A.—5 Esp. N. P. C. 268.

SECTION III.

Conveyance of goods; and first, of the extent of liability at common law.

1. *How far it arises by custom of the country.*

By a delivery of goods to be conveyed for hire, to any one who exercises such public employment, "the law charges the person so entrusted, as responsible, at

* In England, by the custom of the country, recognised by the courts, carriages, &c., ought to keep the *left* side of the road; hence, the following verses, noticed by Horne Tooke, in his "Diversions of Purley."

"The rule of the road is a paradox quite,
In riding or driving along;
If you keep to the left you are sure to go right,
If you keep to the right, you go wrong."

In *Pennsylvania*, travellers should keep to the *right* side.

all events, for every injury, arising in any other way than from the act of God, or of the enemies of the State." For though the force be ever so great, as if an irresistible multitude of persons should rob him, he is nevertheless chargeable.—Ld. Raym. 919.—1 Wils. 181. supra.

This rule, however apparently severe, is so established by the policy of the law, for the security of all persons, the necessity of whose affairs obliges them to trust those sorts of persons in the course of their dealings; otherwise, these carriers might have an opportunity of ruining them, by fraudulently combining with thieves, &c. and yet doing it in so clandestine a manner, as might hardly be possible to be discovered. —Hob. 18.

In support of the same rule of policy, "every thing is a negligence in the carrier or hoyman, &c. from the moment when he receives the goods into his custody, which the law does not excuse; and, to prevent collusive litigation, and the necessity of going into circumstances impossible to be unravelled, the law always presumes against the carrier, unless he shows the injury to have been done by the enemies of the State, or by such act as could not happen by the intervention of man,—as storms, lightnings, tempests, &c. and the reason why these acts only are held not to charge carriers, seems to be, that, as they are not under the control of the contracting party, they ought not to affect the contract, inasmuch as he engages only against those events, which by possibility and due diligence he may prevent. —ibid.

These rules, though said to be founded in custom, have yet always been considered to be of common law. —ibid.

If A. delivers goods to B. to be carried from C. to D. and B. charges and receives cartage of them to the consignee's house at D. from a warehouse there where they are usually unloaded, but which does not belong to him; B. must answer for the goods, if destroyed in

the warehouse by an accidental fire. Nor will it vary the case, in any degree, that he allows all the profits of the cartage to another person, and that that circumstance is known to the consignee.—5 Term Rep. 389.

A greyhound is delivered to a carrier, who gives a receipt for it; the greyhound being afterwards lost, the carrier cannot set up as a defence, that the dog was not properly secured when delivered to him.—2 Stark. 323.

But the law regulating the responsibility of common carriers, does not apply to the case of carrying intelligent beings, such as negroes. The carrier has not, and cannot have, over them, the same absolute control that he has over inanimate matter. In the nature of things, and in their character, they resemble passengers, and not packages of goods. It would seem reasonable, therefore, that the responsibility of the carrier should be measured by the law which is applicable to passengers, rather than by that which is applicable to the carriage of common goods.—2 Peters' S. C. R. U. S. 155.

The ancient rule of the law of carriers, that the carrier is liable only for ordinary neglect, does not apply to the conveyance of slaves.—ibid. 156.

2. *How far the liability arises by reason of the reward.*

Another reason, upon which this liability is founded, is in respect of the reward, and not, as some seem to have thought, because he had a remedy over against the hundred. The liability existed at common law, long before that remedy was given by the statute of Winton; and many cases were so decided previous thereto, on the ground of the reasonable premium to which he was entitled, and which, at that time, served as a criterion of the extent of such liability. Hence, in cases where the value of the goods delivered to him was fraudulently concealed, or misrepresented, it was considered, that, as his warranty and insurance were in respect of the reward, and that the reward ought to be proportioned to the risk incurred, such fraud and con-

cealment annulled the contract altogether, and relieved the carrier.—Jeremy on Car. 33.

If a parcel be given to a wagoner, to carry for his own gain, and not for the profit of his master, the master is not liable, in case the parcel be lost.—2 C. & P. 613.

3. *How far the liability arises by his being an insurer.*

A carrier is considered also in the nature of an insurer, wherein he differs from any other common bailee, who engages to take only the same care of the goods that he does of his own, or to use ordinary care. The exercise of such a public employment, is a tacit acknowledgment of all the duties belonging to that character; and, upon this ground of being an insurer, he has been declared to be answerable even for inevitable accident.—1 T. R. 33.—Jones on Bailm.

But, on the same principle, he is not compellable to incur an extraordinary hazard, without a proportionate premium: "If he make a greater warranty and insurance, he will take the greater care, use more caution, and be at the expense of more guards or other methods of security, and therefore he ought, in reason and justice, to have a greater reward."—4 Burr. 2229.

As fraud, or concealment of the real extent of the risk to be run, will annul the obligation, so also, if the carrier be prevented, by artful misrepresentation, from expressly proposing a caution against such an undertaking on his part, it will be as much a ground for exempting him from the consequences, as if he had directly inquired respecting the contents, and stipulated for a premium according to the declared value.—ibid.

A common carrier being an insurer, is responsible for a loss occasioned by accidental fire, provided such loss happen while the goods remain in his custody *as a common carrier.*—6 Johns. Rep. 170.

As, where the goods intrusted to a common carrier, were consumed by an accidental fire, communicating

to a booth where the goods had been deposited by the carrier in the course of the journey, it was held, that the carrier was liable, although the jury found that the goods were consumed without any actual negligence on the part of the carrier.—1 Term Rep. 27.

But, where the goods are not remaining in the defendant's custody as a common carrier, he is not liable; as, where they had been carried by the defendant from A. to B., and there deposited in his ware-house, merely for the convenience of the owner, until they could be forwarded by another conveyance, (the owner not paying the defendant any thing for the ware-house room,) and were there consumed by an accidental fire, it was held, that the defendant was not liable; 4 Term Rep. 581: and it has been held, that a carrier may exclude all responsibility for a loss by fire, by a notice to that effect.—1 Selw. N. P. 304.

Where it is the nature and course of a carrier's employment, to carry and deliver the goods, and receive payment for them, and return it to the shippers of the goods; if he be robbed of the money, he is liable for it, although he has received only the ordinary freight, and no distinct commission for the sale of the goods, and bringing back the money, be allowed.—11 Johns. Rep. 107.

If a box of clothes, packed by the party's own hands, be sent by a carrier, and lost, the judge will recommend the jury to give the fair value of it in damages, although, what particular articles the box contained, cannot be proved.—2 C. & P. 613.

4. *How far the liability of the contract arises from the terms of his contract, express or implied.*

It is an implied term of the contract, that he provide proper carriages or vessels, in all respects adequate to the purpose: and the law presumes a promise to that effect, without any actual proof: 5 East R. 428; still, however, those means would be deemed sufficient, which, without any extraordinary accident, will probably perform the journey.—1 Str. 128.

So, also, where the general terms of his undertaking imply a delivery to the consignee, he will not be allowed to absolve himself from that duty, by any custom which may not be mutually known.—2 Esp. N. P. R. 893.

He also still continues liable to answer for the consequences of gross negligence or misfeazance; no stipulation can ever exempt him from this responsibility.—16 East R. 244.

The plaintiffs sent goods packed in a box, by the defendant's wagon. The box was placed, with its lid outwards, at the tail of the wagon, which was left, during several hours of the night, standing in the road, opposite to an inn where the wagoner stopped, without any person to watch it. The box was forced open, and its contents abstracted. A notice was proved, limiting the carrier's responsibility to £5: Held, that the carrier was guilty of gross negligence, in leaving the wagon so exposed, and was, consequently, liable for the loss.—1 M. & P. 583.

SECTION IV.

Liability—How restrained by the act of parties, or otherwise.

1. *By public notices.*

We come now to consider how far the common law liability may be restrained by a mutual contract, expressed generally on the one part, by a public notice, and implied on the other by a supposed tacit acquiescence in the terms of such notice, in which, it is most material to consider how such notices are to be construed.

However just and reasonable it may be, that the carrier should insure the goods, at all events, without which there could be no public security, it is equally reasonable that he should, in cases of extraordinary risk, have the power of contracting upon extraordinary terms.

If the rules of commercial policy impose upon him the responsibilities of an insurer, his reward ought, we have seen, in every case, to correspond with the greater warranty undertaken, and additional precautions necessary to be provided by him.—4 Burr. 2301. supra.

Wherever, therefore, the owner of the goods has been guilty of a fraudulent representation, such fraud has been held to excuse the carrier. This fraud may be effected, either by withholding the true contents when demanded, concealing it in part, or in not communicating it when the carrier has publicly given notice that he will not take charge of goods of a certain value, unless an extraordinary premium be paid for them.—ibid.

The favour which the courts have always shown to carriers, in relieving them where any circumstances of a fraudulent nature have appeared, has perhaps induced the latter to limit their responsibility in all cases where the goods are beyond a certain value: and thus, the being allowed to make a special contract in some justifiable cases, has established a pretence for exempting themselves from the common law liability, without an advanced price, in almost all others. For, as there are comparatively very few parcels, &c. of a value below the limit which carriers have fixed as the extent of their responsibility, it will appear, that—except in their being compellable to take the charge of goods as public servants, and the form of action against them, grounded on such a relation, which an injured party has it still in his power to adopt according to circumstances—no part of the securities or easy remedies, contemplated by the ancient common law, for the greater facilities of commercial intercourse, at present remain, wherever the value of the goods falls within the effect of these notices. While, therefore, the power of fixing the additional premium on valuable goods, is usurped by such arbitrary and interested parties, and the general inclination of the public to avoid subjecting themselves to extortion, and a consequent general neglect to give the notice required, continues; carriers,

instead of being what they were originally intended, useful and faithful subsidiaries to public commerce, prove only arbitrary extortioners, and successful evaders of the policy of the common law.

2. *How such notices are to be construed.*

But this dereliction of public duty, has not been always successfully effected; the courts having afforded every relief in their power, by construing such notices most strictly in the language, and requiring as equally strict a proof of the publicity to be given to them. Whenever they have been compelled to admit the carrier to be a contracting party, they have, at the same time, obliged him to a strict proof of his having complied with every condition incident to such special undertaking.

Hence, it has been determined, that the notice in the office should be written in characters so large, that no person delivering goods there, can fail to read it, without gross negligence; and that, if the carrier's servant receives goods at a distance from such office, the special terms on which the proprietors take charge of them, ought to be communicated by some other medium, as by public advertisements, printed hand-bills, &c.—3 Camp. 27.

So, also, it will be intended, that, whatever notice is thus circulated by his authority, will so far dispense with any notice in the office, as to afford a presumption, that the statement circulated contains the whole of the limitations intended by the carrier to be put upon his common law liability.—2 Camp. 108.

So, also, before he will be allowed to limit that responsibility, he will be bound to take care, that every one who usually employs him, is bona fide and fully informed of the limitations to be imposed. For that knowledge will not be inferred, particularly where such a notice calls the attention of the public to every thing attractive, but endeavours to conceal whatever

may be calculated to repel customers; as being printed in a much smaller character, &c.—2 Camp. 415.

Where the carrier circulates hand-bills, he will be bound by their contents, and he cannot avail himself of the notice in the office, the terms of which vary from the hand-bills, and are more advantageous to himself.—2 Camp. 108.

In cases where the carrier has not given a general notice in the manner above-mentioned, he will not be permitted to avail himself of the general usage as it prevails amongst other carriers.—4 Esp. N. P. C. 178.

A notice suspended at the ends of the journey, will not attach upon goods delivered at intermediate places, where notices are not affixed.—Gouger v. Jolly, Holt, N. P. C. 317.

In order to affect a person who sends goods by a carrier, with notice of the terms on which he deals, it is not sufficient to show that a printed notice was exhibited in the carrier's office, where the goods were delivered by a porter, although the porter could read, and had seen the notice, if, in fact, he had never read it.—2 Stark. 53, 279.

If a carrier receive goods at a distance from his office, to be discharged from his common liability, he must prove that the special terms on which he deals, were communicated to the owner of the goods through some other medium than a notice stuck up in the office; and that, to be of any avail, must be in characters so large, that a person, delivering at the office, cannot fail to read it, without gross negligence.—3 Camp. 27.

It is not sufficient notice, to limit the common responsibility of a carrier, for him to paste upon the door of his office, where goods are received and delivered, a bill blazoning the advantages of his conveyances, and stating, in small characters, at the bottom of it, that he will not be answerable for goods above the value of

£5., unless entered as such, and paid for accordingly. —2 Camp. 415.

Notice to the principal, is, in law, notice to all agents: therefore, if stage-coach proprietors, have given the usual £5 notice to principals in London, in the month of January, and their traveller, who proves that he was ignorant of such notice, send them from Downham, a parcel containing £87, which he has received for them in the month of February, by a coach belonging to these coach proprietors, and it be lost, the coach proprietors will not be responsible; the notice given to the principal, being considered, in law, as notice to all their agents.—5 D. & R. 484.—1 C. & P. 550.

In an action against a carrier for negligence, the defendant cannot read in evidence the advertisement in a newspaper by which he limits his responsibility, unless he first prove that the plaintiff was in the practice of reading that paper.—1 Stark. 136.

A carrier is liable for gross negligence, although the goods are above the value mentioned in his public notice, and although they have not been specially entered and insured.—2 B. & A. 356.

Gross negligence is a question for the jury.—6 Moore, 469.—4 B. & A. 21.

Where a valuable bank parcel, sent by a stage-coach, is lost, and it is proved that, on the arrival of the coach, the driver was in liquor, and that the book-keeper, who saw the entry of it in the way-bill, thinking that the coachman (as was the custom,) had the parcel about his person, did not ask him concerning it, or look into the coach for it: Held, to be a loss arising from gross negligence, and that the proprietors were liable, as carriers, for the value, notwithstanding that they had put up the usual notice in their office, disclaiming liability to be responsible for losses beyond £5.—4 Price, 31.

A parcel was sent, by the defendant's coach, from Worcester to London, directed to be delivered at the latter place: it arrived in London, and was taken from

the coach-office of the defendants, in a cart, under the direction of one person only, for the purpose of delivery, and lost: Held, that the defendants were liable for such loss, as it amounted to gross negligence, and defeated the usual notice, that they would not be accountable for a loss exceeding £5.—2 Moore, 18.—8 Taunt. 144.

Notwithstanding a notice by carriers, that they will not be accountable for goods of a particular description, above the value of £5, "unless specified and paid for as such when delivered;" Held, that they were liable for damage done to an article of this description, much above the value of £5, although not paid for as such when delivered, their book-keeper having been informed of its value, and desired to charge for it what he pleased, which should be paid, provided it were taken care of.—3 Camp. 527.

If a carrier give notice, that he will not be accountable for goods above the value of £20, unless entered, and an insurance paid, over and above the price charged for carriage, according to their value, a person who enters silk exceeding the value of £20, and does not pay the insurance, cannot recover any part of the value of the goods, if lost; although the price he agrees to pay for the carriage of the silk, is, on account of its superior value, higher than the ordinary price charged for the carriage of bulky articles; and, although the carrier does not prove that the loss happened by any of those accidents against which the law makes him an insurer.—3 Taunt. 264.

A carrier who gives two notices, limiting his responsibility, is bound by that which is least beneficial to himself.—2 Stark. 255.

The owners of vessels on the navigation between A. and C. having given public notice that they would not be answerable for losses, in any case, except the loss were occasioned by the want of care in the master, nor even, in such case, beyond ten per cent. unless extra freight were paid; the master of one of the ships

took on board the plaintiff's goods, to be carried from A. to B. (an intermediate place between A. and C.) and to be delivered at B: the vessel passed by B. without delivering the plaintiff's goods there, and sunk before her arrival at C. without any want of care in the master: Held, that the owners of the vessel were responsible for the whole loss, in an action on the contract.—8 T. R. 531.

The plaintiffs sent goods packed in a box in the defendant's wagon. The box was placed with its lid outwards at the tail of the wagon, which was left, during several hours of the night, standing in the road opposite to an inn where the wagoner stopped, without any person to watch it. The box was forced open, and its contents abstracted. A notice was proved, limiting the carriers liability to £5: Held, that the carrier was guilty of gross negligence, in leaving the wagon so exposed, and consequently liable for the loss.—1 M. & P. 583.

A common travelling trunk, of a large size, containing apparel and jewels, having been lost by the defendant, a carrier, either through his having omitted to place it on his coach, or having fastened it there insecurely: Held, that he was liable to make compensation to the owner, a gentleman travelling by his coach, though no disclosure was made of the value of the contents of the trunk, and though there was a notice in the carrier's office, limiting his responsibility to five pounds, in the absence of such disclosure, which notice the owner of the trunk, having been in the office, had an opportunity of seeing; and, under the above circumstances, the jury were properly directed to consider generally whether the carrier had been guilty of gross negligence, without reference to the nature of the article conveyed.—4 Bing. 218.

In all such cases, the advertisements, hand-bills, &c. have been considered circumstances proper to be left to a jury.—ibid.

In a case where the terms of the notice were,

"valuable goods will not be accounted for, if lost, of more than five pounds value, unless entered as such, and one penny insurance for each pound value paid on delivery to, &c." the court held, that the tenor of these printed conditions seemed to be, that the defendants were not liable to any extent, unless the parcel had been entered and paid for as valuable; and the plaintiffs recovered neither to the extent of five pounds, nor yet the price paid for carriage and booking.—1 H. Bl. 296.

Where the advertisement was, "That the carrier would not be answerable for any goods committed to his care above the value of twenty pounds, unless he was paid in proportion to the risk," his liability to that extent was held to be admitted, and he was allowed to pay that sum into court.—2 East, R. 128.

Where the notice purported, "That the proprietors would not be responsible for more than five pounds, unless booked for and paid for accordingly;" it was held, that the payment of that sum into court, was to be considered an admission of the contract to be liable to that extent.—4 East, R. 371.

Where the general notice was, "the proprietors will not be accountable for any parcels, &c. of more value than five pounds, unless entered as such, and paid for accordingly;" it was held, that the plaintiff, under the terms of such a contract was not entitled to recover any thing; the goods being above that value.—5 East, 507.

Where the notice was conceived in the following terms; "Take notice, that the proprietors, &c. at this office, will not be accountable, &c. for any goods, or any package whatever, if lost or damaged, above the value of five pounds, unless insured and paid for, &c;" the court said, "We cannot help giving effect to those terms in the notice, by which, inasmuch as the goods in question were above the value of five pounds, and not insured, or paid for at the time of the delivery, the defendant's could not be held accountable *at all*:"

—and the verdict, even for five pounds, was set aside, and a non-suit entered.—6 East, 564.—2 Smith, 622.

But, where the terms of the notice were, "Take notice, that no more than five pounds will be accounted for, for any goods or parcels delivered at this office, unless entered as such, and paid for accordingly," the plaintiff was allowed to retain his verdict for five pounds, as a limited amount of damages recoverable by him under the condition of this contract.—Jeremy on Carriers, 47.

From the strict construction put by the courts on these several notices, it appears, that, while they have endeavoured to uphold the common law liability of the carrier, they have yet given efficacy to the limitations of such contracts, whenever they could fairly be set up, and appear to have been recognised and acted upon by each party.

A notice given to the vendor of goods, that the carrier by whom he sends them limits his responsibility, is equivalent to notice to the vendee who directs them to be sent.—1 Esp. 36.

3. *When notices are waived.*

There are some instances, where the subsequent conduct of the carrier has been considered a waiver of those conditions by which he has endeavoured to limit the extent of his responsibility; as,

When he carries the goods beyond the place to which they were consigned, and where he might, and, by the implied conditions of delivery, ought to have delivered them; and the loss happens during such ulterior conveyance, and so out of the line of the original undertaking.—1 T. R. 531.

So, also, on the principle by which these notices have been supported; viz, that the carrier shall not incur a risk, with the extent of which he is not fully acquainted, a notice has been held not to protect the carrier in cases where that principle cannot apply. —Jeremy on Carriers, 48.

Where a paper parcel, containing notes of country bankers to the amount of £1300, and addressed to their clerk, in order to conceal the nature of its contents, was delivered to a carrier, without any notice of its value, and booked to be carried by the mail; and was accepted by him to be so carried, but was sent by a different coach, and stolen or lost; and the carrier had previously given notice that he would not be answerable for any parcel above £5 in value, if lost or damaged, unless an insurance was paid: Held, that although no insurance had been paid, the carrier was responsible for the loss.—5 B. & A. 342, 350.

A carrier who had given notice that he would not be liable for loss or damage, unless occasioned by the actual negligence of the master or mariners, was held not to have waived that notice, by having, on former occasions, made allowances to plaintiffs for damage, without inquiring into the cause of such damage.—2 M. & S. 1.

The notice, although in its terms made, and perhaps meant, to extend to every description of goods, cannot be indefinite, but must, it is said, be construed with reference only to the subject matter, and applied to such cases only, where the party undertaking has no other means of knowing of what nature or value the goods may be, but that which the law of contract affords him, in requiring a bona fide representation to be made at the time of delivery. When, therefore, the bulk, or evident quality of the goods, sufficiently notifies the value, and corresponding risk, it is clear, and has been decided, that the principle of exemption cannot apply. —16 East, 244.—3 Camp. 267.

Hence, the distinction has been drawn, that, where the value is obvious, carriers are not exempted from their common law liability by the consignor's neglect to comply with the terms of any notice. The carrier, on receiving the goods, being aware of the risk, may and ought to make his demand of extra premium; and the not doing so is a waiver of the condition reserved of making an extra charge on such goods; and there

is little doubt, that the great price usually paid for the carriage of such bulky goods, would always be considered to include an extraordinary premium, proportionate to the greater care necessary to be used, and the risk to be encountered.—Jeremy on Carriers, 50.

So, the words *glass*, &c. written on any package, has been deemed a sufficient notification of the risk, and throws the burthen on the carrier, of showing a demand made of an extra price, as a condition precedent of his undertaking the charge; and the neglect to make such demand will be considered a waiver of any further condition to be performed by the consignor, as agent of and for the person bringing the action.—3 Camp. 527.

But, where a carrier might protect himself by a continuing notice, his having neglected so to do in some instances, will not be considered a general waiver of a special acceptance.—2 Maule & Selw. 1.

SECTION V.

What acts shall be a discharge of this liability.

1. Parties own acts.

We have seen, that the real ground of contract is founded on a reward or consideration proportionate to the risk and duty to be performed.—4 Burr. 2299, supra. An essential part of the contract is therefore a bona fide communication of the charge to be undertaken; that the carrier may be properly apprized of the extent of the duty imposed upon him. On the principle, therefore, that "out of a fraudulent deception, no action arises," a party cannot recover, where the carrier has been deceived by him: the liability is determined, and the party is deprived, by the fraud, of that remedy, which is said to be founded in the reward. —Carth. 485.

So, where the loss is occasioned by circumstances which lie in the care and cognizance of the owner, and not of the carrier, no action can be maintained

against the latter; for such duty is in the nature of a condition precedent.—3 Esp. N. P. R. 74.

So, if the contract were made under such circumstances, existing at the time, as must necessarily be taken to have included a tacit stipulation that the party should not be considered a common carrier, without which no reasonable man would have undertaken for the conveyance, he cannot be made liable in that character.—1 East, 604.

2. *Act of God.*

The act of God for which a carrier is excused, has been defined, by Lord Mansfield, to be "a natural necessity, and to arise *inevitably*; as winds, storms, a sudden gust of wind, &c. It means something in opposition to the act of man; for every thing may be said to be the act of God, which acts by his permission, every thing by his knowledge."—3 Esp. 131.—1 Str. 128.

To prevent litigation, the law presumes against a carrier, in every case, except as to such act as could not happen by the intervention of human means: and thus, he has been held liable where the injury arose from a fire which raged with unextinguishable fury, and originated at a distance from the carrier's premises. —1 Term R. 33.—5 Term R. 389.

3. *Act of enemies of the State; termed in England, the "King's enemies."*

Under this term, are included only those *foreign* enemies of the State, which are such by open declaration of war, and not such domestic enemies as are considered so, by reason of any temporary insurrection or riot: in which cases, as, in England, the county or hundred are responsible for not preserving the peace, the carrier might recover under the statutes against them for losses occasioned thereby.—3 Esp. N. P. R. 131.

But these statutes have no force in any of the United States; nor does the author of this work know of any

such responsibility on the part of any county or township therein; yet *query*, might not a sheriff, constable, mayor, or such other conservative officer, be accountable for *neglect of duty*, on a special action on the case?

SECTION VI.

Miscellaneous duties connected with the contract.

1. *Refusal to carry goods.*

However the carrier may have succeeded in limiting his common law liability, by becoming a special contractor, there is no doubt that he is still to be considered in the light of a public servant, and, as such, is liable to an action for refusing to take charge of goods, if the hire be tendered to him, and he has convenience to carry the same.—2 Show. 327.

2. *What shall be considered a delivery* TO *a carrier.*

It is clear, that where a party refuses to place any confidence or trust in the carrier, as by sending his servant with the goods; there being no bailment of them to the carrier, they never can be considered to have been in his possession, so as to charge him as a general servant, or a special bailee, and no duty can consequently arise.—1 Str. 690. He may, however, undertake specially for their safe delivery, and such contract will be equally binding upon him with his public duty.

As it is the possession of the goods which raises the duty, it will be necessary in all cases, to prove that the goods came to his possession. Thus, where the goods are left for a carrier in an inn-yard, or a warehouse, at which other carriers put up, it will not be considered a delivery, so as to charge him, without a special notice of their being so delivered, or some previous instructions to that effect.—1 Ld. Raym. 46.

So, in order to charge a particular carrier, some proof will be necessary that the goods were received by an authorised agent on his behalf, and that he is in

the exercise of such public employment.—Jeremy on Carriers, 61.

Delivery of goods by the vendor, on behalf of the vendee, to a carrier, is a delivery to the vendee, though the particular carrier be not named by the vendee; and the vendee cannot maintain an action against the carrier for non-delivery; 3 Bos. & Pul. 582.—3 Taunt. 423; even though the carrier is to be paid by the vendor.—2 Camp. 639.

If the owners of a ship have chartered her to a third person, the captain must, for that voyage, be taken to be the agent of the latter for goods delivered to him; and the owners cannot, for that occasion, be made liable for his acts.—3 Esp. N. P. R. 27. But, where goods sent to a wharfinger, are by him delivered to the mate of the ship, and are received by him, it will be a good delivery to charge the ship-owners, though the goods are lost before being actually placed on board. By such delivery, the responsibility of the wharfinger being determined, the obligation of the owner, at that instant, arises.—5 Esp. N. P. R. 41.

Where the carriage is by means of the post-office, it will not be a sufficient delivery, to make the consignee liable for the loss, if the letter were given only to a bell-man; but it is otherwise of a servant usually employed by a carrier to receive or fetch goods to be carried.—Peake's N. P. Cases, 186.

3. *What shall be considered a delivery* FROM *a carrier.*

It has been held, from a very early period, that carriers are bound to *deliver*, as well as *carry* goods; and, even if they were not so bound by any general course of trade, they would undoubtedly be bound to give notice of the arrival of the goods, to the persons to whom they are consigned.—3 Wils. 129.—2 Bl. R. 916. Hence, it will be considered gross negligence, wherever damage is occasioned by the goods lying in their warehouses, whether they receive the porterage to their own use, or not.—5 Term R. 389.

So, the known usage of a hoyman, to ply to a particular wharf, will not exempt him from this obligation; nor will the delivery of the goods at that wharf, be a discharge of his duty.—2 Esp. 693.—5 Esp. 41.

In the case of goods brought by ships from foreign countries, the bill of lading is merely a special undertaking to carry from port to port: according, therefore, to the established course of trade, a delivery on the usual wharf is such a delivery as will discharge the owners.—5 T. R. 389, supra.

In the river Thames, the liability of the master, by the custom, continues while the goods are delivering into a lighter, sent by the consignee to receive them, until the loading is completed.—Peake, Cas. N. P. 140.

When the ship-owner or master cannot deliver the goods, by reason of their being wrongfully detained by revenue-officers, his liability nevertheless continues, inasmuch as he has a remedy over against the officers, for such illegal detention.—1 Camp. 451.

If a carrier deliver goods to a wrong person, though by mistake, he is guilty of a conversion, for which trover will lie.—Peake, Cas. N. P. 49.—4 T. R. 260. —5 Burr. 2825.

Where a carrier received a parcel of bank-notes, to be carried from London to Dover, under a contract to deliver them the next day (fire and robbery excepted) and the parcel, having been deposited by one of the defendants in a desk at their office in London, was missing a short time after he left the office: Held, not to be a loss within the exceptions in the contract, as it could not be considered to be a loss by robbery.—3 Stark. 143.

A. B. C. and D. being in partnership as carriers, entered into an agreement with S. & Co. to carry goods for them from London to Frome, where they should be deposited in the warehouse of A. the resident partner, until S. & Co. should be ready to receive them into their own. The goods, having been forwarded, were,

after they had been deposited in A's warehouse, destroyed there by fire: Held, that the liability of A. B. C. and D. as carriers, ceased on the arrival of the goods at Frome, and, that when they were deposited in A's warehouse, they could be considered only as warehouse men.—8 Taunt. 443.

Goods are sent by a carrier, who cannot hear of the consignee at the place to which they are directed, but receives letters, ordering them to be sent elsewhere, which he does. The transaction turns out to be a fraud on the consignee, by some person unknown: Held, that the consignee might recover against the carrier, he having been guilty of negligence in so delivering the goods.—1 M. & P. 357.—4 Bing. 476.

Guardians of a female under age, who had eloped without their knowledge or consent, are justified in detaining her clothes; and a carrier, to whom they had been delivered, for the purpose of conveyance, is justified in delivering them over to the guardians; and, by so doing, he cannot be considered as having been guilty of a conversion.—1 C. & P. 101.

4. *Lien for hire.*

It is laid down as a general rule, that wherever any one is obliged to receive goods, to perform any duty on them, he has a lien on them at common law. For, as that imposes the burthen, it also gives him the power of retaining for his indemnity.—Ld. Raym. 752.

Yet this lien extends only to the carriage price of the particular goods on which the hire is due: any further lien, on a general balance, must be founded on a general usage of trade, or on a particular contract to that effect, between the parties.—Jeremy on Carriers, 70.

To justify so extensive a claim on the ground of general usage, the courts will require evidence of instances, ancient, numerous, and important, before they will alter the common law situation of carriers.—6 T. R. 519.

No usage of particular individuals, will therefore be sufficient to bind other parties, unless it were so general a practice as to furnish an inference that the party must have had knowledge of it, and to warrant a conclusion that he contracted with the carrier under such an understanding; for this, as it is a usage against the general law of the land, will be regarded with the greatest jealousy.

So, where the consignor has, by the usage of trade, always paid the carriage, the carrier will not be allowed to set up a lien, on a general balance due by the consignee, against the former, if the hire on the particular goods carried be tendered to him; for, although the property becomes vested in the consignee, immediately on delivery to the carrier, yet it shall not operate to defeat the equitable right, which the consignor has of stopping *in transitu*, or charge him with a lien founded on an agreement between the carriers and third persons. —8 Term R. 330.

Nor where a part of the goods has been delivered to different persons, as under an endorsement or transfer of part of a bill of lading, can the carrier retain the residue, so as to make one consignee pay freight for what was delivered to another, although the goods formed originally only one entire consignment. But, when the whole is to be delivered to one person, under a single consignment, then, although a part has been delivered, he may retain the residue until the freight for the whole be paid to him.—6 East, R. 622.

A ship-master, claiming a lien for freight, does not part with it by depositing the goods in the king's warehouses, according to the requisitions of an act of parliament.—1 East. R. 507.

As the captain is personally responsible for the payment of goods, stores, &c., supplied for the use of the ship, he has a lien on the freight and goods to the amount for which he is responsible, and may insist on the freight being paid to himself, instead of the owners; and, if the consignees pay it over to them, after notice

from the captain, their goods will still remain subject to his lien, and they will continue liable to repay the freight to him.—4 Esp. N. P. R. 22.

With respect to the lien of a wharfinger, it is matter of usage, and not of common law, as in the case of carriers and inn-keepers, who are obliged to receive the goods. But this usage has been so often proved to exist, and to extend to a right of detaining for their general balance, that it is now considered an established right.—1 Esp. N. P. R.

Where a carrier retained part of the goods, till payment of the carriage should be made, and, after long delay, exposed them to sale, and they were purchased for the owner; in trover for the goods, the surplus money over the carriage, arising from the sale, was thought to be sufficient damages.—Addis. Rep. 47.

A carrier has both a lien on the goods, and an action against the consignor for the freight; and, although he may have called upon the factor of the consignor for payment, he is not chargeable with laches if he omit to pursue the factor.—1 Rep. Con. Ct. 186.

SECTION VII.

1. *Of freight, porterage, warehousing, and wharfage.*

The liability of land and water carriers, being alike founded, as we have seen, in contract, coupled with the duty by custom, it will not be irrelevant to consider, in this place, a little further, that relation which subsists between the water-carrier and the consignee, when the bill of lading is evidence of a more express contract.

As the bill of lading is the title under which the captain receives the goods, he is strictly bound by all the terms thereof, so as to be liable even for unintentional default; as, if he delivers the goods by mistake to a wrong person, &c.

So, also, the captain is entitled to recover, against

the consignee or his assignees, the freight, demurrage, primage, &c., or other claims which he may have, according to the terms of the bill of lading; and his freight is to be calculated by the measures and rates therein mentioned.—4 Taunt. R. 102.

As an endorsement of the bill of lading, by the consignee, for good consideration, confers a legal right on such assignee, *he* also may maintain an action against the captain, in the same manner as the original consignee might have done: but a bill of lading is not transferrable like a bill of exchange, by mere endorsement. —1 Camp. N. P. R. 369.

On the other hand, the becoming such assignee, and accepting the goods, is an adoption of all the terms of the original contract and its consequent liabilities, as payment of freight, &c. What, however, is such acceptance, must be determined from all the relative situations and interests of the parties, and the nature of the existing contract.—2 Camp. 587.—13 East, 399.

The peculiarity of this contract is, that, unless the freight be wholly earned by a strict performance of the voyage, no freight is due or recoverable; nor can a promise to pay *pro rata* be implied, unless the goods be voluntarily accepted at such an imperfect stage of the contract.—2 Camp. 466.

Nor will any acknowledgment that the freight was to have been paid by the shipper at the port of lading, be a sufficient consideration for the freight, *as such*, if not earned: and, if the freight has been paid, it may be recovered back.—1 Camp. N. P. R. 84.

But, when there is a special contract for previous payment, before freight is earned, the having received the goods on board would be a good consideration to support an action on such agreement.—ibid.

A warehouseman is not, like a carrier, bound by any custom of the country, nor to be considered as an insurer: he stands, therefore, in the situation of an ordinary bailee for hire, and so is answerable only for

ordinary neglect, &c.—Jones on Bailment, 96. He is bound only to take reasonable and common care of any commodity intrusted to his charge.—Peake, 114.

The difficulty which has arisen in cases respecting them, has originated from the uncertainty when the carrier was to be considered as having the goods in his possession in one or other of these characters. He may, when his duty as a carrier is determined, assume the new and less responsible one of a warehouseman, for this is for the convenience of the owner of the goods, but they cannot be coupled, nor exist at the same time. Where the duty of the carrier ceases only by delivery to the party, his liability as such continues while the goods are deposited in any ware-house, &c., (for doing which, even although a separate price be charged,) or while they are in the hands of any porter; the warehouseman, porters, &c., for this purpose, being considered only as his servants; and he will be liable for their defaults.—4 Term R. 581.

The liability of the warehouseman commences from the time the crane is applied to raise the goods into the warehouse; and it is no defence that they were injured by falling into the street, from the breaking of tackle, the carman who brought the goods having refused the offer of slings for farther security.—4 Esp. 262.

A warehouseman, receiving goods from a consignee who has had actual possession of them, to be kept for his use, may nevertheless refuse to redeliver them, if they be the property of another.—5 Taunt. 759.

Wharfage seems to be due only when the goods are laid *upon* the wharf, for the purpose of being loaded or unloaded. It differs specifically from anchorage or mooring; which are charges incidental rather to the ship than to the goods.—3 Burr. 1409.—1 Bl. R. 423.

The liability of a wharfinger who undertakes to convey goods from his wharf to the vessel in his own lighters, is similar to that of a carrier.—1 Stark. 72.

SECTION VIII.

Property in goods, when and in whom vested.

The delivery of goods to a carrier, is a delivery to the consignee, so as to vest in him a legal right of property, and the carrier becomes his agent, even although the consignor agrees to pay the carriage.—3 Camp. 254.

Such a rule is in some degree necessary to protect the carrier; for, in general, he knows nothing of the consignor, nor has he any clue to find him, but only the party to whom the goods are directed, and to whom he looks for the price of the carriage on the delivery. —8 Term R. 334.

Nor will the circumstance of the consignor's having paid the booking, alone make him a principal to the contract with the carrier, since that would be considered to be done as the agent of the consignee, at whose risk they are sent.—2 Camp. N. P. R. 639.

Where, however, the consignor has paid the carriage also, that is sufficient to raise a privity of contract with the carrier, and he may maintain an action against him for the non-delivery of the goods, according to the implied undertaking.—ibid.

The general rule holds equally, whether the consignee directs the goods to be sent by a particular conveyance, or not. In the former case, it is a direct appointment by him of a carrier for the purpose: in the latter, he shall stand to the risk, because he leaves it in the power of the person from whom he has ordered the goods, to send them by any carrier he thinks fit. —Jeremy on Carriers, 99.

A carrier has such a property in the goods, as will enable him, like any other bailee, to maintain his possession against all but the rightful owners, or to recover them by action in trover.—2 Bl. Com. 453.

So, also, the driver of a stage-coach, &c. has, as

against his employers, only a bare charge, but as against all the rest of the world, he has such a special property as will enable him to charge any wrong-doer as upon his own goods; for he has, in fact, the possession and entire control over them.—Leach's C. C. 862.

Where goods were delivered to a carrier at Exeter, to convey to Falmouth, and there deliver them to an agent, who was to forward them to the consignee abroad; and the carrier detained the goods on the ground of a lien against the agent for his general balance; it was held, that trover might be maintained against the carrier at the suit of the consignor.—1 Selw. N. P. 313.

SECTION IX.

Stoppage in transitu.

But, although the property is thus absolutely vested in the consignee, by delivery to the carrier, yet it is not so entirely, but that there remains an equitable power in the consignor of resuming the property, under certain circumstances, before it actually gets into the possession of the consignee. When this right is exerted, the property becomes revested in him, as much as if he had never quitted the possession.

Although, at first, this right was considered only an equitable remedy in cases of fraud or insolvency, it has now become firmly established as a common law right, —3 Bos. & Pul. 44; and continues until the goods have reached either the actual or constructive possession of the consignee; for then, he, and all who claim under him, acquire a complete dominion over them. —3 Term R. 464.

The principal point, and indeed only difficulty, is, in determining what shall be such an actual or constructive delivery into the possession of the consignee, as will determine this right of the consignor; for then the state of the transit ceases.—3 Bos. & Pul. 49.

If the consignee appoint another carrier or agent to

receive the goods, this may be a constructive delivery to the consignee, for many purposes; but it is said, that only an actual delivery can divest the right of stopping them *in transitu*.—Jeremy on Carriers, 103.

There may, however, be an actual delivery, without the necessity of a corporal touch, or even that the consignee should see them.—8 Term R. 468; as when the goods are put on board a vessel, chartered by him.—3 Esp. N. P. R. 58; or if they be handed over to his packer, and his agent opens, and examines the quality of the goods, the right would be gone.—4 Esp. N. P. R.—3 Bos. & Pul. 320, 469; and so, if any other act of ownership be done by the consignee or his agent. —4 Esp. N. P. R. 82.

So, if they be delivered to a warehouseman, to whom the consignee pays rent for warehousing them. —3 Bos. & Pul. 119; or if the consignors themselves charge him with rent for keeping the goods in their warehouses, after the time when they ought to have been taken away by the terms of the contract.—1 Camp. 452.

So, the right is gone, if the same warehouseman be agent for both parties, and the consignor give an order to him to deliver the goods to the consignee, although the warehouseman does not even make a transfer to his name in the books; for it is an acknowledged parting with the possession and right over them: so, if he send an unendorsed bill of lading to the consignee, who disposes of the goods under it.—2 Camp. 243.

Where, however, the consignor asserts his right, and demands the goods of the carrier, the latter shall not be allowed to question the title of a person from whom he received them, nor be permitted to prove the property in another party, so as to oust the consignor of this right.—Peake, N. P. C. 188.—3 Esp. N. P. C. 115.

Nor where a mere claim of the goods has been made by the consignee, without any actual transfer made, or possession given, shall it be considered sufficient to defeat the consignor's right to stop the goods: nor where

the goods happen to be in a stage of their transit, under the direction of the consignee, and cannot be considered as having reached their final destination.—1 Esp. 240; nor if the transit be complete, where the goods continue in the king's warehouses, for they are to be considered as still in the possession of the carrier, and subject to his lien.—2 Esp. 615.

So, if the goods are in the custody of another, by a foreign attachment, or are seized by the sheriff on the road, at the suit of the consignee's creditor, it cannot defeat the consignor's right, if asserted by him; for the process can give the attaching creditor no greater right than the consignee himself had.—2 Esp. 613.

Neither is it reasonable, that part payment should make a difference, so as to prevent the right of the consignor from attaching; for then some trifling sum, by way of earnest, would always be paid for that purpose. The only effect of a partial payment is to lessen the lien *pro tanto*, which the consignor would otherwise have upon the full value. Until, therefore, an actual delivery, the consignor may, upon the insolvency of the consignee, or other just cause, retake his goods, upon repayment of the sum which has been paid.—7 Term R. 440.

The consignor may stop goods *in transitu*, before they get into the hands of the consignee, in case of the insolvency of the consignee; but, if the consignee assign the bill of lading to a third person, for a valuable consideration, the right of the consignor, as against such assignee, is divested.—2 Har. Dig. 425.

The unpaid vendor may stop goods *in transitu*, before they come to the hands of the vendee's factor; although such factor has the bill of lading endorsed to order in his hands, and is under an acceptance to the vendee on a general account.—5 M. & S. 350.

If the shipper of goods take a receipt from the captain, who executes a bill of lading in favour of a subvendee, the former may stop the goods *in transitu*.—2 Marsh, 127.—6 Taunt. 433.

Where the consignee of goods handed over the shipping-note and a delivery-order to the wharfinger, to deliver such goods, on arrival, to J. S: Held, not to pass the property in such goods, so as to prevent the consignor from stopping them *in transitu*.—1 C. & P. 53.

Although goods be delivered to the packer of the purchaser, he having no warehouse of his own, if they were to be paid for in ready money, and this was intimated to the packer when he received them, they still may be stopped *in transitu*.—4 Camp. 181.

Goods, sent by the directions of the purchaser, to a wharfinger, to be forwarded to him, may be stopped *in transitu* in the wharfinger's hands.—1 Camp. 282.

A. agreed to buy some articles of plate from B. who was to get A's arms engraved upon them, and to pay for the engraving: Held, that a delivery to the engraver for that purpose, was not a delivery to A. so as to defeat B's right of stopping the goods *in transitu*, the price of the goods not having been paid by A.—7 T. R. 64.

The vendor of goods, having taken the vendee's acceptances in payment, cannot stop the goods *in transitu*.—6 Taunt. 433.—2 Marsh, 127.

A usage for carriers to retain goods as a lien for a general balance of account between them and the consignees, cannot affect the right of the consignor to stop the goods *in transitu*.—3 Bos. & Pul. 42.—1 Camp. 282.

When a party remits money on a particular account, for a particular purpose, and the consignee becomes insolvent, it may be stopped *in transitu*: otherwise, where it is a general remittance from a debtor to his creditor, on account of his debt.—2 Esp. 578.

A claim made, without obtaining actual possession, is sufficient in the case of stoppage *in transitu*.—2 Esp. 613.—1 Esp. 240.

A. being indebted to B. on the balance of accounts,

including bills still running, accepted by B. for A. consigns goods to B. on account of this balance: Held, that A. has no right to stop goods *in transitu*, on B. becoming insolvent before the bills are paid.—4 Camp. 31.

If the vendors receive from the vendee, warehouse rent for the goods remaining in their warehouse, beyond the period at which they ought to have been removed, the delivery is complete, and the right of stopping *in transitu* is gone.—1 Camp. 452.

When the purchaser of goods has lodged an order to deliver them with the wharfinger in whose warehouse they lie, and the latter has transferred them in his own books to the name of the purchaser, the vendor's right to stop them *in transitu* is gone, and the wharfinger is bound to hold them as the agent of the purchaser, and the same effect is produced by the delivery-note being lodged with the wharfinger without a transfer in his books.—1 N. R. 69.—2 Camp. 243.

Where goods are delivered at a wharf to a vendee, who afterwards ships them there, no subsequent stoppage of the goods *in transitu* can take place.—7 Taunt. 59.—2 Marsh, 366.

Where goods to be paid for on delivery, are stopped *in transitu*, the vendor may still maintain an action for goods bargained and sold, if he offer to deliver them on being paid.—1 Camp. 109.

If a carrier, after notice from the vendor of goods to stop them *in transitu*, by mistake deliver them to the vendee, the sale is nevertheless rescinded, and the vendor may bring trover for them against the vendee.—7 Taunt. 169.—2 Marsh, 457.

The transitus continues until the goods arrive at the place mentioned by the vendee to the vendor: therefore, where Lisbon merchants sent an order through London merchants for goods which were to be sent to Lisbon, and the goods were delivered to the agent at Manchester: Held, that the transitus continued until they reached Lisbon.—6 B. & C. 482.

If a consignee generally makes use of a wharfinger's warehouse as a place to keep his goods in, the transitus is at an end when the goods are deposited there.—4 Bing. 516.—1 M. & P. 378, n.

Delivery by the consignor of a bill of lading, to the consignee, is not such a transfer of the property as will preclude him from stopping the goods *in transitu*.—ibid.

Goods purchased by British merchants, before the war between the United States and Great Britain, in pursuance of orders from American citizens, shipped to the agent of British merchants in the United States, also an American citizen, "on account and risk" of an American citizen, and there being no circumstances of fraud or unfairness in the transaction, were vested in the American at the time of the shipment, and are not liable to condemnation, although the vessel sailed from England after the declaration of war was known there. —8 Cranch, 317.

Where goods are sent on the account and risk of the shipper, the delivery to the master is a delivery to him as the agent of the shipper, and not of the consignee; and it is competent to the consignor, at any time before actual delivery to the consignee, to countermand it, and thus to prevent the consignee's lien from attaching.—8 Cranch, 418.

The endorsement and delivery of a bill of lading, or where, by the terms of the bill without endorsement, the cargo is to be delivered to the vendee, amounts to a transfer of the property, subject to the right of the vendor to stop *in transitu*, if the consideration be not paid.—Coxe's Dig. 674.

If the factor be a creditor of the principal, he has a contingent interest, by virtue of his right of lien, which actual possession will confirm; but a constructive possession will not be sufficient to control the authority of the principal over his own property.—ibid.

A. of Philadelphia, being indebted to B. of Boston, and having made to him repeated assurances of remit-

tance, shipped on board a general vessel bound to Boston, a quantity of flour purchased from C. which, by the bills of lading, was to be consigned to B. but on account and at the risk of A. Two of the bills were retained by A. and the other by the captain. Shortly afterwards, A. finding that he must stop payment, returned to C. the bill of parcels for the flour, which had not been paid for, and delivered to him the two bills of lading. The captain of the vessel refusing to deliver the flour, C. brought a replevin, and obtained possession. On his arrival at Boston, the master delivered the bill of lading which he had, to B: Held, that there having been no contract between A. and B. respecting the flour, or its proceeds, no transfer, by means of a bill of lading, or even by letter of advice, and no possession by the consignee; A. might legally stop the flour *in transitu*, and return it to C.—ibid. 675.

Where, by virtue of the correspondence and course of dealing between a merchant in the city and another in the country, the former is authorized to send goods to the latter without special order, the property in the goods so sent vests in the latter, on the delivery to the carrier.—13 S. & R. 26.

A consignor can stop goods *in transitu* only in two cases:—1st, Where he has received no consideration; 2nd, Where the consignee is insolvent; but not where they have been shipped to pay a precedent debt.—2 Dall. 180.—1 Yeates, 177.

If the factor be a creditor of the shipper, he has a contingent interest, depending upon his acquiring and retaining an *actual* possession of the property, and a constructive possession is not sufficient to prevent a stoppage *in transitu*.—2 W. C. C. R. 283.

But if the consignee be entitled to the property for the use of a third person, though he acts as agent for the shipper, he stands in the character of a trustee for such third person, and, if the consideration have been paid by the *cestui qui trust*, the consignor cannot reclaim the property.—ibid.

The delivery by the master of a vessel to the consignee, of the bill of lading retained by the master for his own use, does not vest in the consignee the legal right to the property.—2 W. C. C. R. 283.

A factor, creditor of his principal, has no lien on goods consigned to him by his principal, for account and risk of the shipper, if, before they get into his actual possession, the consignor has bona fide assigned the bill of lading.—ibid. 294, 403.

A. an inhabitant of the West Indies, being indebted to B. in Philadelphia, consigned goods to him, directing him to sell them, and to apply the proceeds, after first satisfying himself, to the payment of other creditors. C. a creditor of A. attached the goods in the hands of A. before sale. It was held, that B. had a lien on the goods for his debt, in preference to the other creditors.—1 Dall. 3.

SECTION X.

Penalty for carrying letters.

Act of Congress, March 3d. 1825.

SECT. XIX. No stage or other vehicle, which regularly performs trips on a post-road, or on a road parallel to it, shall convey letters; nor shall any packet-boat or other vessel, which regularly plies on a water declared to be a post-road, except such as relate to some part of the cargo. For the violation of this provision, the owner of the carriage, or other vehicle or vessel, may be prosecuted under this section, and the property in his charge may be levied on, and sold, in satisfaction of the penalty and costs of suit: *Provided*, That it shall be lawful for any one to send letters by special messenger.

SECTION XI.

How far a carrier, stealing goods, is guilty of felony.

It is a rule at common law, that, to constitute felony,

the property must be taken from the actual or constructive possession of the owner. Hence, where property is delivered into the possession of any one for a particular purpose, a tortious conversion of it may be a fraud or breach of trust in him, but it cannot make him guilty of felony.—3 Inst. 102.—1 Roll. Abr. 73.

The possession, however, which has been so imparted to him from the owner, may be extinguished by an act which *eo instante* determines the authority and possession so communicated; and then any act which would be felonious in another, becomes equally so in him. Thus, if when goods have been carried by him to the appointed place, he afterwards carry them away, *animo furandi* (with an intention of stealing them) it is a felonious taking.—ibid.

So, if he open a bale or pack of goods, or pierce a vessel of wine, the very act itself determines the trust possession, and the subsequent taking is felonious, for the thing committed to his trust is single and entire. —1 Hawk. c. 33, s. 5.

So, if he sells or delivers over the bale to another, although it seems to be a tortious conversion, rather than a felony; yet if he received the goods into his possession with such an intent, or is, after delivery to another for the purpose of felony, concerned in the subsequent stealing, &c. the whole offence is so entire, that it would be considered a felony in him, either on the ground that the first obtaining of the goods was under a fraudulent pretence, or that the subsequent acts made him an accessory to the felony: and this distinction seems to have been constantly recognised by the courts; although it might seem that the *quo animo* (the intention) with which he originally received the goods, would be the true principle of determining the degree of criminality of any action.

So, if a hackney-coachman detain and convert goods left in his coach, or a hired porter embezzle parcels delivered to him to be carried, it is considered felony, if the original detention be done *animo furandi*, or

they have subsequently purloined the goods.—Leach's C. C. 413.

Where the defendant, who was carter to the prosecutor, went away with his master's cart, and disposed of it, it was held to be felony.—2 East, P. C. 565; and where the defendant, a porter to the prosecutor, was sent by his master to deliver goods to a customer, and, instead of doing so, sold them; the judges held this to be felony.—ibid. 566.

So, if a man, having purchased corn on board a vessel, send his clerk or lighterman with a barge for the purpose of landing it, and the clerk or lighterman embezzle a part of it, this is larceny.—2 Leach, 824, 825. —2 East, P. C. 568.

But, where goods, of which the master has never been in possession, are delivered to the servant for the master's use, and the servant, instead of delivering them to his master, by depositing them in his house or the like, converts them to his own use, this is held to be no larceny at common law.—2 East, P. C. 568.

If the owner of goods deliver them to another, but be present all the time they are in the other's possession, and there be no intention on the part of the owner to relinquish his dominion over them by such delivery, the owner still retains the possession in law, notwithstanding this delivery; and, if the person to whom he has so delivered them, make away with them, and convert them to his own use, he will be guilty of larceny. —2 East, P. C. 683.—1 Hawk. c. 33. s. 2.—As for instance, if the owner give the goods to a man to carry, and accompany him at the same time,—if the man run away with the goods, he is clearly guilty of larceny.

If, intending to steal a cask of wine, a person remove it from the head to the tail of the wagon in which it is placed, and be detected before he can effect his purpose of carrying it off; this is larceny.—1 Leach, 256.

But, where the defendant merely set a package on end, in the place where it lay, for the purpose of cut-

ting open the side of it, to get out the contents, and was detected before he had accomplished his purpose; the judges held that this was not larceny.—2 East, P. C. 556.

CHAPTER X.

INSURANCE AGAINST FIRE.

SECT. 1. Of the nature of this contract.

2. Of the interest of the insured; and herein of double insurances.

3. Of the risk which the insurers engage to run; and herein, of misrepresentations, concealments, and the punctual payment of the premium.

4. Of the assignment of the policy.

5. Of the proof of loss.

6. Description of the property insured.

SECTION I.

Of the nature of this contract.

By this contract, the insurer, in consideration of a certain premium received by him, either in a gross sum, or by annual payments, undertakes to indemnify the insured against all loss or damage which he may sustain in his houses or other buildings, stock, goods, and merchandize, by fire, during a limited period of time.

We have not been able to ascertain the period of the introduction of insurance against fire into England: but it has certainly been in use there considerably more than a century. Of late years, notwithstanding a very heavy stamp duty imposed upon these insurances, they

have been brought into very general, we might almost say universal use, in that country; particularly in London and other cities and large towns; and in the Atlantic cities of the United States, insurances are generally made by prudent merchants and manufacturers upon their buildings and stock in trade; though, it is to be regretted that an avidity on the part of the several chartered insurance companies, to make large dividends, rather than benefit the public by moderate charges, has hitherto tended to prevent insurances from being made so frequently as the security of the citizens from sudden ruin, by the awful calamity of fire, demands.

It was not until the year 1754, that this species of insurance came into use at Paris. In that year, one of the companies, instituted there for marine insurances, obtained from the government permission to make insurances against fire: but they have never, as Pothier informs us, become general, even at Paris.

SECTION II.

Of the interest of the insured; and herein of double insurances.

It often happens, that no one office will insure to the full amount required by a particular person who has a large property to insure; and, in such case, the party can cover his whole interest only by several insurances made at different offices. But then it is proper that each office should have notice of every other insurance thus made on the same effects; otherwise, great frauds might be practised, by insuring the same property to its full value, at several offices at the same time. To guard against such frauds, there is, in the printed proposals of each of the offices, an article which declares that persons insuring must give notice of any other insurance made elsewhere upon the same houses or goods, that the same may be allowed by endorsement on the policy, in order that each office may bear its rateable proportion of any loss that may hap-

pen. But, unless such notice be given of each insurance, to the office where another insurance is made on the same effects, the insurance made without such notice will be void.

It is not necessary, however, in order to constitute an insurable interest, that the insured shall, in every instance, have the absolute and unqualified property of the effects insured. A trustee, a mortgagee, a reversioner, a factor or agent, with the custody of goods to be sold on commission, may insure; but with this caution, that the nature of the property be distinctly specified; and that all the insurances upon the same property, taken together, shall not exceed the full value thereof.—2 Marshall, 789.

To constitute a double insurance, the property must be twice insured on the same risk, and for the benefit of the same person. If different persons claim different interests in the same subject, each may lawfully insure his own interest.—4 Dall. 350.

In cases of double insurance, the insured may, at his election, sue either set of underwriters; and, upon a recovery against one, the other underwriters are bound to contribute.—4 Yeates, 161.

SECTION III.

Of the risk which insurers against fire engage to run; and herein, of misrepresentations, concealments, and the punctual payment of the premium.

By the terms of the usual policy, the insurers undertake to pay, make good, and satisfy to the insured, all loss or damage, which may happen by fire, during the term specified in the policy, to the houses or other buildings, furniture, or merchandize insured.

By an article of the printed proposals, which are now to be considered as making a part of the contract, it is provided, that "No loss or damage by fire, happening by any invasion, foreign enemy, or any military or usurped power whatsoever, will be made good by this company."

In the following case, a question arose upon the construction of the words *usurped power*, in this proviso.—It was an action of covenant on a policy of the London Assurance Company, upon a malting office at Norwich. The defendants, amongst other pleas, pleaded that the malting office was burned by *a usurped power*; and issue being joined on this plea, the cause was tried at Norwich assizes, and a verdict found for the plaintiff, subject to the opinion of the court, upon a case which stated, That, on the 27th of Nov., a mob arose at Norwich, on account of the high price of provisions, and spoiled and destroyed a considerable quantity of flour; that thereupon the proclamation was read, and the mob dispersed for that time: that afterwards, another mob arose, and burned down the malting office mentioned in the policy."—Lord C. J. Wilmot, Mr. Justice Clive, and Mr. Justice Bathurst, against the opinion of Mr. Justice Gould, determined, that the true import of the words *usurped power* in the proviso, was, an invasion from abroad, or an internal rebellion, where armies are drawn up against each other; when the laws are silent; and when the firing of towns becomes unavoidable; but that those words could not mean the power of a common mob.—2 Wils. 363.

The London Assurance Company still, however, retain the proviso in its original form. The Sun fire-office, in the year 1727, added the words *civil commotion*: most of the other English offices have introduced the same words; and some have the words "*riot, tumult, and civil commotion.*" The proposals of the Pennsylvania Fire Insurance Company, of Philadelphia, to which we now refer, as the general form of such proviso in the United States, set forth, "No loss or damage to be paid on fire happening by any invasion, foreign enemy, civil commotion, riot, or any military or usurped power whatever."

A. abroad, having two warehouses, writes to England to effect an insurance upon *one* of them only, without stating, as was the fact, that a house nearly adjoining

to it had been on fire on that evening, and that there was danger of the fire again breaking out, and sends his letter after the regular post time. The fire having broken out again on the day next but one following, and consumed A's warehouse; held, that this was a material concealment, although A's letter was written without any fraudulent intention.—6 Taunt. 338.—2 Marsh Rep. 46. S. C.

By a policy under seal, referring to certain printed proposals, a fire-office insured the defendant's premises from the 11th of Nov. 1802, to the 25th of Dec. 1803, for a certain premium which was to be paid yearly on each 25th of Dec., and the insurance was to continue so long as the insured should pay the premium at the said times, and the office should agree to accept it. By the printed proposals, it was stipulated, that the insured should make all future payments annually, at the office, within fifteen days after the day limited by the policy, or forfeit the benefit thereof, and that no insurance was to take place till the premium was paid; and, by a subsequent advertisement, (agreed to be taken as part of the policy) the office engaged that all persons insured there by policies for a year or more, had been and should be considered as insured for fifteen days beyond the time of the expiration of their policies: It was held, notwithstanding this latter clause (the insured, before the expiration of the year having had notice from the office to pay an increased premium for the year ensuing ,or otherwise they would not continue the insurance, and the insured having refused to pay such advanced premium) that the office was not liable for a loss which happened within fifteen days from the expiration of the year for which the insurance was made, though the insured, after the loss, and before the fifteen days expired, tendered the full premium which had been demanded; for the effect of the whole contract, &c. together, was only to give the insured an option to continue the insurance, or not, during fifteen days.—Harrison's Dig. title Ins.

SECTION IV.

Of the assignment of the policy.

Insurance offices in general give notice on the policy, that it shall be of no force if assigned, unless such assignment be allowed by an entry in the books of the office, or endorsed on the policy. This is perfectly reasonable. The offices may choose for whom they will insure: they are not obliged to insure for every person that may apply to them. In some instances, character may be a sufficient reason for a refusal. But the offices would be deprived of this option, if any person insured might assign his policy to whom he pleased, without their concurrence.

The Pennsylvania Fire Insurance Company, set forth in their conditions, that:—"The policy may always be transferred—*provided*, such transfer be endorsed upon the policy and brought to the office for approval within thirty days after the date thereof: otherwise, the premium shall be considered as sunk for the benefit of the assurers."

SECTION V.

Of the proof of loss.

One of the conditions in a policy of insurance against fire, stated, that, if any difference should arise on any claim, it should immediately be submitted to arbitration; and, after directing how the arbitrators should be chosen, added, that no compensation should be payable, until after an award determining thereof should be duly made. It was held, that the assured might maintain an action on such policy, notwithstanding the condition, where it appeared that the insurers denied the general right of the assured to recover any thing, and did not merely question the amount of damages. —2 C. & P. 551.

By the printed proposals of a fire insurance company, it was stipulated, that "the insured should pro-

cure a certificate of the minister, &c. of the parish, importing that they knew the character of the insured, &c." It was held, that the procuring of such certificate was a condition precedent to the right of the insured to recover.—6 T. R. 710.—2 H. Bl. 577.

Where a policy of insurance stipulates that the loss shall be paid three months after proof made thereof, a suit cannot be supported until the three months have elapsed.—2 Dall. 280.—S. C. 3 Dall. 477.—2 Yeates, 281.

SECTION VI.

Description of the property insured.

An agricultural building was described in a policy as a barn, though it was not strictly so: Held, not to be such a misdescription as would vacate the policy, as the building, had it been rather more correctly described, would have paid the same rate of insurance. —1 M. & M. 90.—Tenterden.

The policy was, on premises "where no fire is kept, and where no hazardous goods are deposited." These words mean the habitual use of fire, and deposit of hazardous goods; and therefore where a fire happened in consequence of making a fire, and bringing a tar-barrel on the premises, to repair them: Held, that the insured were entitled to recover.—ibid.

If a person who is not a linen-draper, insures "his stock in trade, household-furniture, *linen*, wearing apparel and plate," by a policy against fire, this will not protect linen-drapery goods subsequently purchased on speculation; and the word *linen* in the policy, must be confined to household linen, used by way of apparel. —3 Camp. 422.

CHAPTER XI.

LETTERS OF CREDIT.

LETTERS OF CREDIT are of two sorts: *general* and *special*; and both are given to furnish persons, when travelling, with cash, as their occasions may require. They are commonly open or unsealed, and contain an order from the writer to his correspondent, to furnish the bearer with a certain, or an unlimited sum. The difference between them is, that the former is directed to the writer's friends at all the places where the traveller may come, the other to some particular friend; making himself responsible for the repayment of whatever moneys shall be advanced in compliance with the credit given, on producing a receipt or a bill of exchange, which he thinks proper to have from the person credited.—Beawes' Lex. Mer. 454.

If any money be advanced on either species of these letters, and bills of exchange given for the sum on the person who wrote them, he is obliged to accept and pay the same.—ibid.

As the giver of these letters is thus responsible for the punctual repayment of the money advanced, he ought to be very cautious to whom he gives them, more especially those without limitation, as, in the hands of a dishonest person, they may prove his ruin; and, as the person who requests the credit can easily calculate what amount of cash he is likely to want, I think the compliment, for it can be nothing else, of an unbounded credit, should be excused, being really of no service either to him that pays, or him that receives it.—ibid.

Advice by post, should always follow a letter of credit, and a duplicate of it accompany such advice; and it would be prudent therein to describe the bearer, with as many particulars as may be requisite, lest he should lose or be robbed of his credentials, and a stranger reap the benefit of them.—ibid.

These letters are written in various forms, and though a copy may be superfluous to most persons, yet it may be serviceable to some:

New York, November 10, 1830.

Sir,—This is to accompany Mr. Edward Hamilton, and to request you will furnish him with three hundred pounds sterling (*or with as much cash as he shall require of you*, if you give an unlimited credit,) for which please to take his bills on me, or on any other upon whom he shall think proper to draw them; and I do hereby engage for their punctual discharge, and remain, sir,

Yours respectfully,

JAMES SMITH.

To Mr. Henry Bolton,
Merchant, London.

A. and B. addressed a letter of credit to C. saying: "If D. wishes to take goods from you on credit, we are willing to lend our names as security for any amount he may wish. May, 30th, 1804."—D. took goods from C. on credit several times, for which he paid; and in Dec., 1805, took another parcel of goods on credit, for which he gave his note to C. which was not paid. In an action brought by C. against A. and B. it was held, that the letter of credit did not extend beyond the first parcel of goods, delivered to D. and that A. and B. were not liable for an indefinite time, but only for an indefinite amount, for one time.—8 Johns. Rep. 119.

A. of New York gave a letter of credit to B. addressed to C. in Albany, requesting C. to deliver goods to B. on the best terms, to a certain amount. C. instead of delivering the goods himself, gave B. a letter to D. in Geneva, requesting him to deliver goods to B. to the amount, and engaging to be responsible, and D. accordingly delivered the goods to B. In an action brought by C. against A. for the amount, it was held, that the engagement of A. to C. did not make him answerable for goods furnished by any other person. A

surety is not answerable beyond the scope of his engagement.—10 Johns. Rep. 180.

Where a person gives a letter of credit to A. addressed to P. & Co., by which he authorizes A. to draw bills, to a certain amount, on P. & Co. and P. & Co. having dissolved their partnership, A. draws a bill on P. who accepts it: the guarantor is not liable to P. on his letter of credit; and P. is not precluded by the letter of credit from maintaining a suit against A. for the amount of the bill which he had accepted and paid. —16 Johns. Rep. 100.

CHAPTER XII.

PARTNERSHIP.

SECT. 1. What is necessary to constitute a partnership.

2. How far the acts of one partner are binding on his associates.

3. Of suits BY partners, against third persons.

4. Of suits AGAINST partners, by third persons.

5. Of suits between partners.

6. Dissolution of partnership, by death, limitation of articles, consent, bankruptcy, or otherwise; its consequences to the parties, and also to third persons.

7. Of part owners.

SECTION I.

What is necessary to constitute a partnership.

The formation of a partnership is an act of great importance to the contracting parties. "When a man

enters into partnership," observes Lord Kenyon, (Peake, 74) "he commits his dearest rights to the discretion of every one who forms a part of that partnership, in which he engages. It is an imprudent thing for a man to enter into partnership with any person, unless he has the most implicit confidence in his integrity."—In Crawshay v. Maule, (1 Swans. 509) Lord Eldon says, "If men will enter into a partnership, as into a marriage, for better and for worse, they must abide by it."

An actual, without an apparent interest in the profits of a concern, constitutes a dormant partnership.—An apparent, without an actual interest, constitutes a nominal partnership.—16 East, 174.

In order to constitute a complete partnership, as well between the parties as in respect to strangers who may deal with them, a communion of participation of profits and loss is essential. The shares of the parties must be joint, though it is not necessary that they should be equal.—2 Selw. N. P. 859.

If the parties be jointly concerned in the purchase, they must also be jointly concerned in the future sale, otherwise they are not partners.—1 H. Bl. 37.

A. for himself and his two partners, (who were general merchants,) B. for himself and partner, (who were oil-merchants,) C. for himself and son, (who were also oil-merchants,) agreed to purchase jointly as much oil as they could procure, on a prospect that the price of that commodity would rise. A. was to be the ostensible buyer, and the others were to share in his purchase, at the same price that he might give. A. & Co. were to have a half; B. & Co. a quarter; C. & Co. the remaining quarter. In pursuance of this agreement, A. & Co. ordered a broker to buy quantities of oil. The broker accordingly bought several ship-loads; and, amongst the rest, a ship-load from the plaintiffs. To some of the vendors, (not plaintiffs in this action,) B. & Co., and C. & Co. during the treaty, declared it to be a common concern between them and

A. & Co.; but, with respect to the plaintiffs, the purchase was made in the name of A. & Co. only, without any notice that the other defendants had a concern in it. The majority of the court, viz., three judges against one, were of opinion that B. & Co. and C. & Co. were not to be considered as partners with A. & Co. on the ground that there was no communion of profit and loss. Each party was to have a distinct share of the whole; the one to have no interference with the share of the other, but each to manage his share as he judged best. The profit or loss of the one might be more or less than that of the other. This was a sub-contract, by which was to be understood a contract subordinate to another contract, made or intended to be made, between the contracting parties on one part, or some of them, and a stranger. A. & Co. were the only purchasers known to the plaintiffs: entire credit was given to them alone. The contracts made with the other merchants were not admissible evidence in this cause, except to prove a fraud, if the facts had gone that length; namely, that the house of A. & Co. as a failing house, was to stand forward, in order to protect the other defendants, who, by such means, might have the benefit of the speculation if it proved fortunate, without sustaining any loss in the event of its failing. No such evidence had been adduced; on the contrary, it appeared, that the objection made by the other vendors to the firm of A. & Co. was, that "they were unknown, and new in trade."—ibid.

Where an agreement was made between A. and B. that B. should give his services and attendance in conducting the business then carried on by A. and for his services so rendered, A. agreed to pay him a certain salary, as well as to pay and allow him a commission of seven per cent. on the profits arising from goods sold, &c. after deducting therefrom the amount of the salary and rent of store, it was held, that this did not constitute a partnership.—15 Serg. & R. 137.

A. and four others were owners, in distinct proportions, of a cargo purchased with the proceeds of an

outward cargo, also belonging to the same persons. A. who was engaged alone in business, effected an insurance, without the knowledge of the other owners, on his proportion of the cargo which was over-valued in the policy. In an action by A. for a return of premium, it was held, that, as there was no agreement amongst the owners to share in the future sale of the return cargo, and as A. was engaged in business by himself, unconnected with the other owners, and had effected the policy on his own account, without their knowledge, the court could not intend a partnership from the facts that the cargo of the ship belonged to the plaintiff and four other persons, and was purchased with the proceeds of the outward cargo, which also belonged to the same persons.—2 Johns. Cas. 328.—9 Johns. Rep. 470.

If a contract be made with one of several persons who have not a joint interest at the time of the contract, a subsequent joint interest does not constitute a joint liability upon such contract.—1 Mont. on Partn. 15.

In respect of creditors, he who takes a half of all the profits. indefinitely, shall, by operation of law, be made liable to losses, if losses arise; upon the principle, that by taking a part of the profits, he takes from the creditors a part of that fund which is the proper security to them for the payment of their debts.—16 Johns. Rep. 34.

A. and B. ship-agents at different ports, entered into an agreement, to share, in certain proportions, the profits of their respective commissions, and the discount on tradesmen's bills employed by them in repairing the ships consigned to them, &c. It was, however, expressly stipulated, between A. and B. that they were not to be answerable for each other's losses. It was held, that, although with respect to each other, these persons were not to be considered as partners under this agreement, yet that they had made themselves such with regard to all persons with whom either contracted as ship-agent.—2 H. Bl. 235.

The distinction taken in the preceding case, as to an agreement not constituting a partnership as between the parties themselves, though it may have that effect as to third parties, was recognised in the following case:—A. having neither money nor credit, offered to B. that if he would order with him certain goods to be shipped upon an adventure, *if any profit should arise from them, B. should have half for his trouble.* B. having lent his credit on this contract, and ordered the goods on their joint account, which were furnished accordingly, and afterwards paid for by B. alone: it was held, that B. was entitled to recover back such payment in assumpsit against A, who had not accounted to him for the profits; such contract not constituting a partnership as between themselves, but only an agreement for a compensation for trouble and credit, though B. was liable as a partner to third persons, who were creditors.—4 East, 144.

A. B. and C. the proprietors of a stage-coach dividing the general profits of the concern, agreed that they should each work the coach one stage with horses, their separate property, and maintained respectively at their separate expense: It was held, that B. and C. were not jointly liable as co-partners with A. for the price of hay furnished at A's request for the use of the horses which were his separate property, but were kept by him for the purpose of working the coach on the stage allotted to him under the agreement. *Note:* it did not appear in what manner, upon an adjustment of the accounts, the hay furnished to the different horses was paid for; whether as part of the general outgoings, or separately by each party.—2 Taunt. 49. —Holt's N. P. C. 227.

A. was employed by B. to sell goods, and was to receive for his trouble whatever money he could procure for them beyond a stated sum: this was held not to constitute a partnership between A. & B. as to these goods.—2 H. Bl. 590.

So, where A. having purchased two bullocks, put them to depasture upon the lands of B. under an

agreement that, after they had been fattened, the profit to be made on the resale above a certain sum (at which A. then valued the bullocks) should be equally divided between A. and B. It was held, that A. and B. were merely partners in the profits, and that this was a mode of paying B. for the pasture; consequently, A. might maintain an action in his own name, without joining B. to recover the price of the bullocks from a person to whom he had sold them.—1 Camp. 331.

So, where there was an agreement between A. the sole owner of a lighter, and B. a lighterman, that B. in consideration of working the lighter should have half her *gross earnings*, Lord Ellenborough was of opinion, that, as this was only a mode of paying B. wages for his labour, and differed from a participation of profits and loss, it did not constitute a partnership.—1 Camp. 329.

So, an agent, who is paid by a proportion of the profits of the adventure, is not therefore a partner in the goods.—5 Taunt. 74.

But, if the proprietor of a lighter agree with a person by whom it is hired, to share the profits from working the lighter, they are jointly liable to third persons.—1 Camp. 329.

Underwriters on the same policy, by accepting an abandonment, and appointing a common agent to take care of the property, do not thereby become partners. —1 Johns. Rep. 106.

Where real estate is held by partners for the purposes of the partnership, they do not hold it as partners, but as tenants in common, and the rules relative to partnership property do not apply in regard to it. —10 Johns. Rep. 226.—15 ibid. 159.

If two commercial houses, the one in England, the other abroad, agree to divide equally the commissions on the sale of all goods recommended by the one house to the other for sale; such agreement constitutes a partnership between the two houses.—4 B. & A. 663.

Whether an assignment of a share in a partnership, as a security for a debt, makes the assignee liable to third persons, has been agitated.—Barnard, 343.

It seems, that a person who shares the profits of one member of a firm, may be a partner with that member, and yet not a member of the whole partnership.—2 Marshall, 321.

A partnership may be limited to a particular concern, without extending to all the concerns in which another member of the firm is engaged.—Cowp. 814.

Partnerships are not confined to trades: there may be a partnership between attorneys, or between farmers.—1 Blacks. 37.

The members of unincorporated trading companies are liable to third persons, as general partners in the firm for which the company is formed.—3 V. & B. 160.

If the executors of a deceased partner continue his share of the partnership property in trade for the benefit of his infant; and the partnership business is continued, and the executors divide the profit and loss with the partners, but solely for the benefit of the infant; the executors are partners.—1 Maule, 412.

An agreement, that a broker shall have, for his own profit, whatever sum he can obtain upon the sales, above a certain sum, does not constitute a liability as partner to third persons.—2 H. Bl. 590.

If the sailors and the captain agree, that the produce of the voyage shall be divided, in certain proportions, amongst the owners, the captain, and the officers and seamen; it has been ruled that this does not constitute a partnership between the parties, but that the sailors are entitled to wages in proportion to the produce of the voyage.—4 Esp. 182.

An agreement to pay, in lieu of wages, primage, &c. one-fifth of the profit or loss of the voyage, does not constitute a partnership with the captain or sailors.—4 Maule, 240.

Every person is to be deemed in partnership, if he be interested in the profits of a trade, and if the advantages which he derives from the trade are casual and indefinite, dependant on the accidents of trade.—15 Johns. 422.

If A. & B. agree that A. shall receive, as a compensation for his services, half the profits of a store, they are partners as respects creditors.—6 Serg. & R. 259.

Where one person advances funds for carrying on trade, and another gives his personal services, for which he is to receive a proportion of the profits, there is a partnership existing between them, both as regards the parties themselves and third persons.—16 Johns. 34.

An agreement, by the remaining members of a firm, to pay to an out-going partner an annuity for his interest, at the time of the dissolution, in the profits and good-will, does not constitute a liability, as partner, to third persons.—1 Mont. on Partn. 13.

If a partnership for seven years be terminated at the end of one year, and the remaining partner give to the out-going partner a bond for the capital which the out-going partner brought into the trade, with legal interest; and agree to give to the out-going partner an annuity for six years, if the remaining partner so long live, in lieu of the profits of the trade; and the remaining partner covenant that the out-going partner shall have liberty to inspect the books; the partnership, as to third persons, continues.—2 Blacks. 958.

If the out-going partner is to receive an annuity, and a per-centage on all sales to his old customers, and to new customers by him recommended, it seems that the partnership, as to third persons, continues.—2 H. Bl. 242.

It has been said; that the liability of the out-going partner is to be determined by considering whether the payment is certain and defined, or depending upon the casualties of trade.—2 Blacks. 998.

It has also been said, that his liability to third persons, depends upon his agreeing to share the profits, or only relying upon the profits, as a fund for the remuneration of his services.

SECTION II.

How far the acts of one partner are binding on his associates.

The partners are joint-tenants of the partnership property.—Mont. on Part. 20.

One partner may sell the partnership effects.—Godbold, 244.—7 East, 211.

One partner has a right to assign the partnership effects in the name of the firm, by an instrument not under seal.—5 Cranch, 289, 300.

One partner may release partnership debts.—2 Co. 68.—4 Binn. 375.—3 Johns. 68.—14 ibid. 387.—17 ibid. 58.

One partner cannot bind the other by executing a warrant of attorney, under seal, for the firm, to confess judgment against the firm, though it is good against himself.—1 Dall. 119.

A guarantee by one partner, in the partnership name, not in the regular course of their business, will not bind the other partners, unless it be afterwards adopted and acted upon.—12 Serg. & R. 13.

A general partnership agreement, though under seal, does not authorize the partners to execute deeds for each other, unless a particular power be given for that purpose.—7 T. R. 207.

One partner gave a specialty, which he signed with the name of the firm, for a simple contract debt of the firm, and the creditor afterwards executed a release of all demands against the other partner, on account of the partnership debt: Held, that the partner who gave the specialty could not bind his co-partner by it, but that he himself was bound; that being a debt of a

higher nature, it extinguished the partnership debt; and that the release of the partnership debt did not release the specialty, which was the proper debt of the partner alone who gave it.—3 Johns. Cas. 180.—1 Dall. 119.

Where judgment was obtained on a bond similar to the above, against both partners, the court refused to set aside the execution, on the application of the partner who made it, but said, that if the application had been made by the other partner, they would have directed the execution not to be served upon his person or property, but only upon that of the partner who made the bond.—2 Caines' Rep. 254.

If a partner give a bond to the United States, for duties on goods belonging to the partnership, the partnership liability for such duties is discharged, and the partner giving the bond becomes the sole debtor to the United States; and, if a surety on the bond pay it, his claim for money paid is against the partner on the bond alone, and not against the partnership.—2 Johns. Rep. 213.

But, in the case of the United States v. Lyman, Mr. Justice Story has decided, that a bond taken at the custom-house for duties, does not extinguish the debt due by the importers for the duties, but is only collateral security, and leaves the liability of the importer unaffected.—1 Mason's Rep. 492.

A contrary doctrine has been held by Mr. Justice Johnson, in the case of the United States, v. Kelly, in the South Carolina District.

Where one of two partners executes a bond for duties on goods imported with a security, and the security advances his co-obligor money, with which he pays the bond; he may maintain an action against both the partners, for the money lent; this being a partnership transaction: but, had the surety himself taken up the bond, he could have brought an action for money paid only against the partner who executed it.—15 Johns. 409.

If one partner sign the name of the firm to a deed, and acknowledge the seal, and the other partner also acknowledge it, both will be bound.—2 Caines' Cas. in Error, 1.

So, if one partner read and approve a deed, and consent that his co-partner should execute it for both, and his co-partner seals it, and subscribes the partnership name, both will be bound, although only one were present at the execution.—1 Caines' Rep. 192.—9 Johns. Rep. 285.

There is an exception to the general rule, that a partner cannot bind his co-partner by deed. A release under seal, by one partner, in the name of the firm, of a debt due to the partnership, is binding on all the partners.—3 Johns. Rep. 68.—14 ibid. 387.—17 ibid. 58.

Though a partner, as such, cannot bind his co-partner by a bond, or other writing under seal, to comply with an award; yet, where an award was made pursuant to a submission so executed, by one partner, and who afterwards accepted the amount awarded in favour of the partnership, and endorsed a receipt in full on the award, it was held sufficient to bar the partnership claim; for it operated either as a release by one partner, or as an accord and satisfaction.—19 Johns. Rep. 137.

A partner, if authorized by his co-partners, may bind the partnership by seal; and a parol authorization is sufficient. If not authorized, although the partnership is not bound, yet he makes himself personally responsible.—19 Johns. Rep. 513.

But, although one partner cannot bind the other partners by *deed*, without an authority for so doing, yet, in mercantile transactions, in drawing and accepting bills of exchange, it never was doubted that one partner might bind the rest, even without their knowledge or assent.

A new partner, however, cannot be bound in this

manner for an old debt incurred by the other partners, before the new partner was taken into the firm, where the bill or note is in the hands of the original debtor, or any other person having a knowledge of the transaction.—1 East, 48.

It has been said, that if one partner sign a letter of credit, or guarantee, in the name of all the partners, it binds the firm.—ibid.

If the contract be for an antecedent debt due by the partner to the contracting party, the presumption seems to be that the firm is not liable.—ibid.

If at the time of the contract, the contracting party have not notice that the contract does not relate to the partnership, no subsequently acquired knowledge can disaffirm the act.—7 East, 210.

If one of two partners in a speculation in coffee, deliver the coffee for exportation, and borrow from the person to whom it is delivered money upon the security of the coffee, it has been determined that the firm is liable.—1 Mont. on Partn. 33.

One of two partners may give an authority to a clerk, under the firm of the house, and the clerk may, in consequence thereof, accept bills, and sign or endorse notes, in the name of the company.—1 Dall. 269.

In a matter wholly unconnected with the partnership, one partner cannot bind the firm; but the act of one partner, made with reference to business transacted by the firm, although out of the regular course, will bind all the partners.—2 Barn. & Ald. 678.

All that is requisite to render a debt, contracted by one partner, binding and obligatory upon the other, is, that the debt relates to the partnership. It is not necessary, that the money lent, or credit given, should appear to have been actually used for the benefit of the partnership: third persons have no concern with it. —15 Johns. 422.

One partner cannot bind another, by giving a note,

in the partnership name, for his own private debt.—4 Serg. & R. 397.—16 Johns. 34.—6 Munford, 418.

When one of two partners subscribes the co-partnership name to a note, as sureties for a third person, without the authority or consent of the other partners, the latter is not bound; and the burthen of proving the authority or consent of the other partner, lies on the creditor or holder of the note.—19 Johns. 154.

If one of several partners pledge the partnership fund for his individual debt, that would not bind the rest.—1 East, 48.

Where the plaintiff, as endorsee, had received a partnership note, knowing that it was made by one of the partners for his individual debt, it was held that he could not recover,—2 Caines' Rep. 246; and, in a suit by the same plaintiff against an endorser of a note, made in the name of the same partnership, under the same circumstances, the court held, that the plaintiff, who knew that the note was made for an individual debt, could not recover against the previous endorser who was ignorant of that fact.—4 Johns. Rep. 251, 262.—2 ibid. 300.—16 ibid. 34.—4 S. & R. 397.

The burthen of proving that the other partners consented to be bound by a note given by one, in the partnership name, for his private debt, or as surety, or for any thing that is known not to be on account of the partnership, lies on the plaintiff.—19 Johns. Rep. 154.

Where one of several partners commits an act of bankruptcy, which is afterwards followed up by a commission and assignment, he has no longer any property in the partnership effects; but the property is, from the time of such act of bankruptcy, in his assignees by relation, and in the solvent partners.—10 East, 426.

It may be observed, that the general authority of one partner to draw bills or promissory notes to charge another, is only an implied authority; and, consequently, that implication may be rebutted; for it is not essential

to a partnership, that one partner should have power to draw bills and notes in the partnership firm to charge the others: they may stipulate between themselves that it shall not be done; and, if a third person, having notice of this, will take such a security from one of the partners, he shall not sue the others upon it, in breach of such stipulation, nor in defiance of a notice previously given to him by one of them, that he will not be liable for any bill or note signed by the others. —10 East, 264.—3 Camp. 478.

The notice may be express, or it may be inferred from all the circumstances attendant upon the transfer. —1 Mont. on Partn. 35.

If a bill be issued by one partner, in the partnership firm, and be discounted by a person who is informed by such partner that the transaction is to be concealed from the other members of the firm, such discounter cannot recover against the firm.—2 Esp. 523.

If a member of a firm give, without the consent of his partner, a partnership bill for a transaction not relating to the partnership, the partner, on discovery of the fact, does not assent, by insisting upon security, and expressing his dissatisfaction.—2 Cox, 312.

In general, where there is a special or limited partnership, and persons deal with it, knowing its limited nature, they are bound by its terms, and cannot make the partnership liable beyond them.—1 Johns. Cas. 171.—4 Johns. Rep. 251.

Where one of two partners, with the intention of cheating the other, goes to a shop and purchases articles such as might be used in the partnership business, which he instantly converts to his own separate use, if there was no collusion between him and the seller, this is to be considered as a partnership transaction, and the innocent partner is liable for the price of the goods, without proof of any previous dealings between the parties.—1 Camp. 185.

Where one of several partners, with the activity of

the others, draws bills of exchange, in his own name, upon the partnership firm, in favour of persons who advanced him the amount, which he applies to the use of the partnership, although the partners are not jointly liable on the bills (which had not been accepted) they may be jointly sued, by the payees, for money lent.—3 Camp. 493.

A note signed by a partner with the name of the firm, is binding on the partnership, although the promise in the note is expressed, individually, in the first person; and it will be intended that such note was given on the partnership account.—11 Johns. Rep. 544.

Where one receives the note of an individual partner, *as payment* of a partnership debt, the partnership is thereby discharged, and the debt extinguished.—12 Johns. Rep. 409.

Where one of two partners makes a contract, as to the terms on which any business is to be contracted by the firm, although such business is not in their usual course of dealing, and even contrary to their arrangement with each other, and the business is afterwards transacted by, or with the knowledge of the other partner, it was held that he is bound by the contract made by his partner.—B. & A. 673.

If two persons in partnership for the sale of horses, agree between themselves never to warrant any horse; yet, though this be their course of business, if, on the sale of a horse, the property of the partnership, one of them give a warranty, the other will be bound.—2 B. & A. 679.

If, after a general partnership between two conveyancers in the country, money be received partly by one of the firm, and partly by the other, to be laid out upon a mortgage, which is forged by one of the partners without the knowledge of the other, the innocent partner is liable to repay the money.—2 Cowp. 814.

A note signed, on behalf of the firm, by one partner, binds the firm.—11 Mod. 401.

If one partner draw a bill of exchange, for his private debt, upon the partnership, and accept it in the name of the partners, without the knowledge or consent of the other partner, such other partner is not liable upon the acceptance, to a holder who has knowledge of the transaction.—4 Har. & M'Hen. 350.

An authority to one partner, to settle the affairs, receive and pay the debts, does not warrant him to give a note in the partnership name.—1 M'Cord, 18.

An assignment of the partnership funds, made by one person abroad, without the privity or consent of the partners at home, but for a partnership debt, was held to be inoperative and void.—1 Desauss. 537.

The law-merchant, by which a dormant partner is made answerable on a contract entered into by the partnership, of which he is in fact a member, is confined to trade and commerce, and does not extend to speculations in land.—6 Mass. Rep. 424.

One of two partners may give an authority to a clerk, under the firm of the house, and the clerk may, in consequence thereof, accept bills, and sign or endorse notes in the name of the company.—1 Dall. 269.

An order by one partner, to effect an insurance on account of a partnership vessel, binds the firm.—4 Camp. 67.

It has been ruled, that if a member of a London firm go to Manchester, to purchase goods in the course of his trade, and borrow, at Manchester, a sum to defray his expenses to London, the firm is liable.—1 Esp. 406.

If two persons enter into a speculation for the purchase of goods, so as to be partners in that single transaction, a pledge by one of the partners of the partnership-goods, to a person who has not had notice that the property is joint, and where there is no fraud, binds the firm.—Gow, 132.

If, in the commencement of a charter-party, one

partner propose to contract "for himself and his partner," whom he names, the firm is liable, although, through the remainder of the instrument, "the said freighter" only is mentioned, and the obligation at the conclusion of "the charter-party, is in the name of the said freighter," without introducing the name of the partner.—2 Starkie, 451.

It has been ruled, that if a member of a firm be sent abroad to manage the business of the firm, and to procure homeward consignments, for which he is to pay by the proceeds of homeward consignments from England, and by money raised on bills drawn by him upon the firm, and he act in pursuance of such directions, the firm is liable for money advanced upon such bills. 3 Camp. 496.

One partner may bind the firm without its consent, by a simple contract, *not relating to the partnership*, if he deal in the name of the partnership, with a person who has not had notice that he is dealing on his own separate account.—1 Mont. on Partn. 29.

A payment, within six years, of interest and part of the principal, by one of the makers of a joint and several note, has been held sufficient to prevent either of the other partners from availing himself of the statute of limitations.—Doug. 651.

An admission by one partner made after the partnership has ceased, is not evidence to charge the other members of the firm in any transaction which has occurred *since* the dissolution; but the power of partners with respect to rights created pending the partnership, remains after the dissolution.—1 Taunt. 104.

After dissolution, one partner cannot bind the rest, without their consent, by settling accounts with, or allowing credit to the customers of the firm.—4 Munf. 215.

Notice to one member of a firm, is, in a fair transaction, notice to the whole firm.—1 Maule, 259.

SECTION III.

Of suits BY *partners, against third persons.*

In an action by partners for the non-performance of a contract entered into with the partnership, it is essentially necessary that the action should be brought in the joint names of all the persons of whom the partnership consisted at the time when the contract was made, otherwise the parties suing will be liable to be non-suited for the omission of their copartners.—16 Johns. Rep. 34.

But in one case, where an action was brought in the names of the two persons with whom the defendants had dealt as partners, and it appeared, that, at the time of the contract, there was, in fact, another partner, who had, however, withdrawn his name from the firm, but still continued to receive part of the profits; although it was objected that the dormant partner ought to have been joined, Lord Kenyon, C. J. is reported to have refused to non-suit the plaintiffs.—2 Esp. N. P. C. 468.

So, where in an action brought by A. for goods sold and delivered, it appeared that B. who proved the delivery and value of the goods, was the principal manager of A's trade, and that he received for his service a certain salary, and besides that a certain proportion, per cent., on the profits of the plaintiff's whole trade, and inclusively on the profits of the demand in question; it was held that A. might sue alone, and that it was not necessary that B. should be joined with the plaintiff.—2 Taunt. 324.

So, where an action was brought by Mawman, a bookseller, against the printer, for not insuring the Travels of Anacharsis; and it appeared that several other booksellers, and amongst them Evans, a witness, had a share in the work; but, inasmuch as Evans had never contracted with Gillett, but Mawman was the only ostensible man; the court held that he was the

only proper plaintiff: and with good reason, for the only acting partner might owe much money to the defendant, which the defendant might set off; but, if the plaintiff and the dormant partner had sued, that debt of the acting partner could not be set off.—2 Taunt. 323.

There is a material distinction between a case where partners are plaintiffs, and when they are defendants. If you can find out a dormant partner defendant, you may make him pay, because he has had the benefit of your work; but a person with whom you have no privity of communication in your contract, shall not sue you.—ibid.

But where a merchant, carrying on trade on his own separate account, introduced into his firm the name of a clerk, who did not partake of the profits of the business, but continued to receive a fixed salary, Lord Ellenborough held, that, in an action on a bill of exchange, payable to the order of this firm, the clerk ought to have been joined as a plaintiff; for he was to be considered, in all respects, as a partner, as between himself and all the rest of the world: that, where the name of a real person is introduced with his own consent, it is immaterial what agreement there may be between him and those who share the profit and loss: —they are equally responsible, and the contract of one is the contract of all.—2 Camp. 302.

Where goods had been sold in the name of a firm from which one of the partners had previously withdrawn, it was held that the remaining partner might sue alone, and not notice the firm in his declaration. —2 Johns. Cas. 374.

If a surety become bound for a firm composed of several partners, and one of them die before the surety has paid the money, in an action for money paid, the promise must be declared on as made by those partners only who were alive at the time of paying the money. —2 Johns. Rep. 213.

If two joint owners of merchandize consign it for

sale, informing the consignee that each owes one half, and if they give separate and various instructions, each for his own half, it severs the joint interest, and one of the consignors alone may maintain a separate action against the consignee, for a violation of his separate instructions, in respect of the sale of the goods.—8 Cranch, 50.

If a factor, having partnership credits in his hands, should account with, and pay one partner his share, and thereby discharge all his interest in the partnership, it would be an implied engagement to account with each partner severally.—2 Mass. Rep. 405.

But no agreement of the original partners, to sever their interest, would entitle either of them to sue alone for his share, unless, after notice of the partnership, and of the agreement to sever their interest, the factors had consented to it.—5 ibid. 257.

Where the proceeds of a joint adventure were placed in the hands of a third person, who was to pay over to each individual concerned the separate proportion to which he might be entitled; in an action by one of those interested, against such third person, he cannot set up a partnership, to defeat it.—3 Caines' Rep. 54.

The partners in one house of trade, cannot maintain an action against the partners in another house of trade, of which one of the partners in the plaintiff's house is also a member, for transactions which occurred while he was a partner in both houses, whether the action be brought in the life-time of the common partner, or after his decease. But after his decease, the surviving partners of the one house, may sue the surviving partners of the other house, upon transactions subsequent to the decease of the common partner.—6 Taunt. 597.

If one of two partners in the cargo of a ship, make a factor of all the merchandize, both or either of the partners may maintain an action of account against him.—1 Mont. on Partn. 70.

A firm may maintain an action for defamation, for

words spoken of them in their trade.—3 Bos. & Pull. 150.

If a firm admit a new member, upon an agreement that he shall be deemed a partner from a previous day, an action for a partnership debt, contracted before the day when the new member was actually admitted, must be instituted in the name of the old firm.—1 Esp. 182.

An action may be maintained by the real members of a firm, without joining the nominal partners, if it appear that such nominal partners have not any interest in the concern.—1 Mont. on Partn. 71.

If a trader have a clerk, at a fixed salary, whom he holds out to the world as a partner,—an action upon a bill of exchange, drawn in the name of the trader and clerk, cannot be maintained by the trader alone.—14 East, 210.

If an infant be a member of a firm, it seems that he must join in an action commenced by the firm for recovery of a debt due to the firm.—ibid.

If a person employed by three persons, to sell for them timber, in which they are jointly interested, pay to two the shares of the proceeds respectively due to each, the third may maintain a separate action for his share.—1 Esp. N. P. 144.

If a tenant pay to one of two landlords, his share of rent jointly due, the other landlord may maintain an action for his share.—ibid. 145.

Upon the death of a member of a firm, the right of action is in the survivors.—1 Mont. on Part. 73.

When an action is commenced by a part, instead of the whole firm, the defendant may either plead in abatement, or avail himself of the objection at the trial. —1 Bos. & Pull. 67.

A defendant may be held to bail upon an affidavit made by one partner, without the consent of the other, if he swears positively to the debt, and negatives any tender of bank-notes having been made to himself or

either of his partners, to the best of his knowledge and belief.—2 Bos. & Pull. 390.

The surety for the faithful service of a clerk, to a sole trader, is not responsible to such trader and another person with whom he afterwards forms a partnership. —1 Mont. on Part. 132.

If it be agreed, upon the dissolution of a partnership, that each of the partners shall receive certain debts, either partner is a competent witness, in an action by the other partner, to prove payment to him, according to the agreement by a debtor to the firm. —Peake, 21.

A person, who, without having an interest in the firm, suffers his name to be used as a partner, is a competent witness, in an action commenced by the actual proprietor of the concern, to prove a contract made with such proprietor in the partnership name.—5 Esp. 199.

Where a bill of exchange is payable, or endorsed specially to a firm, it has been often ruled, that, in an action by the firm, strict evidence must be given that the firm consists of the plaintiffs.—3 Camp. 239.

In an action commenced by a firm, upon a contract made by one partner, the declaration by one partner, that the property, which is the subject-matter of the contract, belonged to him, and had been allotted to him out of the partnership stock, is evidence against the firm.—1 Maule, 249.

In an action upon a joint contract, one of the defendants, who suffered judgment to go by default, is not a competent witness, on behalf of the plaintiff, to prove that the other defendant was a party to the contract.—4 Taunt. 752.

A father, who holds out to the world, that his son is his partner, and who sends bills, and signs receipts in their joint names, in an action brought in his own name, is not precluded from showing that his son is not a partner.—1 Stark. N. P. C. 25.

To prove a *general* partnership between the defendants, who had admitted a partnership in the *commission* business, it was held, that evidence was admissible, that one of them had subscribed, in the name of the firm, to the stock of a certain company.—11 Serg. & R. 362.

SECTION IV.

Of suits AGAINST *partners, by third persons.*

If three partners (two of whom reside abroad and one in England) be sued, in England, for a partnership debt, and the partner resident in England appear to the action, but refuse to appear for the partners resident abroad, the sheriff, under a distringas against the two partners, may take partnership effects, though paid for by the partner resident in England alone, to whom the partnership was legally indebted; and the court will not relieve him against such distress.—Bos. & Pul. 254.

Where one of the partners is not entitled to the protection of a capitulation, property shipped by the partnership, on joint account, is not protected.—2 Dall. 1, 25.

A shipment being made by a house in the enemy's country, for their own account, in a voyage originating in that country, must be deemed enemy's property, and the share of a neutral partner must follow the fate of the shares of his partners.—2 Gallis. 268.

One partner may be sued on a warranty made by himself alone, without joining his co-partners, where the goods warranted belonged to the partnership.—3 Johns. Rep. 148.

Subsequently admitted partners, though under an agreement to share in profit and loss, from a time antecedent to the contract, ought not to be joined.—1 Esp. N. P. C. 180.

The rule that "the action should be brought in the joint names of all the persons of whom the partner-

ship consisted at the time the contract was made," formerly held with respect to actions brought *against* partners; and plaintiffs were frequently non-suited for not naming *all* the partners as defendants. This rule was considered oppressive; inasmuch as it was not possible for the plaintiffs, in many cases, without the assistance of a bill of discovery, to ascertain the names of all the persons constituting the firm with which they had had dealings. On this ground, the rule was departed from in the time of lord Mansfield, and it was then laid down, that defendants should be permitted to take advantage of this objection, only by a plea in abatement. The rule laid down by lord Mansfield, has been acted on ever since, though the court of common pleas in England has lately manifested a strong disposition to revert back to the ancient rule. The liability of the parties depends on their being partners at the time when the contract is made, and a dormant partner cannot set up the plaintiff's ignorance of his being a partner, to obviate such liability.—4 T. R. 725.

But in a case where there was a stipulation between three persons, who appeared to the world as partners, that one of them should not participate in the profit and loss, and should not be liable as a partner, it was held, that he was not liable as such, to persons who had notice of this stipulation.—1 Camp. 494. n.

If a copartner, by the terms of the copartnership, engage to provide a certain kind of stock for the partnership account, and such stock be contracted for, the vendor may maintain an action for the same, against him alone, or against all the copartners jointly, at his election.—9 Mass. Rep. 119.

A recovery in an action commenced against a part only of the partners of a firm, the others being at the time unknown, is a bar to a subsequent action against all the partners.—18 Johns. Rep. 459.

A partner, discharged under an insolvent law, is discharged from his partnership, as well as his individual debts; for he is severally as well as jointly liable for the partnership debts.—11 Johns. Rep. 193.

If a partner abscond, his separate property may be proceeded against, under the "act for relief against absent and absconding debtors," passed in the state of New York, for a debt due by the partnership, although the other partners are residents within the state, and capable of being arrested.—14 Johns. Rep. 217.

If a firm of three partners, after having ordered goods from abroad, dissolve partnership, and appoint two of the firm agents, to settle the outstanding partnership concerns; and the three assign all their effects, including the goods ordered from abroad, to trustees, for their creditors; and, upon arrival of the goods, the bill of lading to the two who act as agents, and who accordingly receive the cargo; an action for the freight cannot be maintained against the three members of the firm.—1 Marshall, 249.

In assumpsit againt two, on a joint contract, if one of the defendants confess a judgment, for a certain sum, and the other plead the general issue, and go to trial, and a verdict pass against him, for a smaller sum, the judgment on the verdict will be arrested.—2 Serg. & Rawle, 288.

A release of one partner is a release of both; even if they should be jointly and severally bound.—Co. Litt. 232, a.

If the plaintiff consent to discharge one of several defendants, taken on a joint *ca. sa.*, he cannot afterwards retake him, or take any of the other defendants. —6 Term. Rep. 524.

The discharge, under an insolvent debtor's act, of one of two defendants, taken on a joint writ, does not operate as a discharge of the other defendant.—5 East, 147.

A specialty executed by one partner, though binding on him alone, is an extinguishment of a debt due by the partnership to the obligee.—3 Johns. Cas. 180.—2 Johns. Rep. 203.

Where money is advanced to a partnership under a

guarantee, and the partnership is dissolved, and the debt is then carried, at the request of the debtors, to their separate accounts, according to their proportion of interest in the partnership, and the creditor gives the partners separately a credit, for such proportion, and discharges the partnership's account by carrying it to such separate account, and no notice is given thereof to the guarantor, the latter is discharged from all responsibility.—1 Mason's Rep. 323.

A creditor, by a bond of two obligors, who, after the assignment under a commission of bankruptcy against one of the obligors, took the other in execution, and, after having received part payment, consented to his discharge, has been allowed to prove under the commission a half of the remaining debt.—1 P. Wms. 237.

The giving of time to one of three joint debtors, does not discharge the others; nor, as it seems, suspend his right of action against them.—2 B. & A. 216.

An action cannot be maintained against part only of a firm for a violation of a partnership *contract*.—1 Mont. on Part. 83.

But an action may be maintained against only part of a firm for a *tort*.—ibid.

Where one partner makes a warranty on the sale of goods, an action may be maintained, on the warranty, against that partner, without joining the other.—3 Johns. Rep. 148.

A fraud committed by one of the copartners, shall not charge the partnership.—6 Mass. 242.

If, in an action against a firm, one of the defendants plead bankruptcy, the plaintiff may enter a *nolle prosequi* as to him, and proceed against the others.—1 Wils. 89. But if one of the partners plead infancy, it has been ruled that the plaintiff cannot enter a *nolle prosequi* against the infant, and proceed against the adult. —3 Esp. Rep. 76.

The right to proceed against a dormant partner, is elective in the creditor, not compulsory.—17 Ves. 412.

A partnership debt, on the death of all except one of the partners, becomes a debt to the survivor, in his own right, and may be set off against his separate debt. —1 Mont. on Part. 91.

A debt due by an individual partner, cannot be set off against a partnership demand.—1 Hen. & Munf. 186.—2 Bay, 147.

But, if a firm be carried on in the name of only one person, a separate debt due by that person may be set off, either in an action commenced in his own right, or in an action commenced by the firm.—ibid.

If it be agreed between a separate tradesman and the members of a firm, that the separate debts due to him by each member of the firm, shall be set off against the joint debt due to him by the firm; and the parties continue their dealings, without any express renewal of their agreement; the joint and separate debts may be set off.—2 Taunt. 171.

The courts of common law will, on motion in some cases, order opposite demands arising upon judgments, to be set off against each other, although the parties to the different records are not the same.—1 Mont. on Part. 91.

A judgment recovered by a separate plaintiff, against a firm of two members, cannot be set off, on his application, against a judgment recovered against him by the trustees under an insolvent act, for one of the defendants.—3 East, 149.

Where one partner delivers partnership property to a third person, who receives it, knowing that it is partnership property, in payment of his individual debt, in an action by the partner against the creditor of the individual partner, for the price of the goods, the debt of the one partner is not a defence, or set-off, against all the partners.—16 Johns. Rep. 34.

A judgment obtained against one partner, is a bar to a suit against both, though the new defendant was not

known to be a partner until after the judgment.—9 Serg. & R. 142.

One partner may enter an appearance for another, but he cannot be compelled so to do.—7 Term Rep. 207.—2 Dall. 331.

The private estate of a copartner is first liable to private creditors, and the copartnership effects to the copartnership creditors.—3 Desauss. 207.

The plaintiff cannot issue a separate execution upon a joint judgment.—6 Term Rep. 525.—Hob. 59.

A joint execution may be executed against one of the firm.—2 Blacks. 947.

On a separate execution against the property of only one member of a firm, the plaintiff is entitled only to the partner's share of the partnership property.—1 Mont. on Part. 99.

The sheriff must seize the whole of the partnership effects under an execution, and sell an undivided share. —ibid.

The vendee under the sheriff becomes tenant in common with the remaining partner.—1 Salk. 392.

On an application to the equity of the Supreme Court (of New York) they will take notice of the rule in chancery, that partnership property, seized in execution for the separate debt of one of the partners, cannot be held against the joint creditors; nor can the share of such partner be applied to the separate debt, until after the partnership accounts have been taken and settled.—2 Johns. Rep. 280.

At common law, a partnership stock belongs to the partnership, and one partner has no interest in it, except his share of what is remaining after all the partnership debts are paid, he also accounting for what he may owe the firm.—6 Mass. Rep. 242, 271.

But a creditor of one of the firm has a right to attach the partnership effects against all creditors whose

demands are not upon the company.—11 Mass. Rep. 242.

Where one of two partners, resident abroad, is sued here, he is not allowed to plead, in abatement, that his copartner is not sued with him.—N. Carolina Cases, 78.

A court of common law will not, unless upon abuse of its process, or consent, direct an inquiry as to the interest of the partner against whom the execution has issued.—Comb. 217.

The proper line for the sheriff to pursue, is to put some person in possession of the share, as vendee, and to leave him and the parties interested to contest the matters in equity.—3 Bos. & Pull. 288.

On a separate judgment against a dormant partner, whose interest is confined to the profits, but does not extend to the capital, it seems that the creditor cannot issue execution against the effects of the partnership, subject to an account.—17 Ves. 404.

The remaining partner may file a bill in equity for an account against the vendee of the sheriff.—1 Mont. on Part. 105.

In a bill in equity against one partner, for a joint demand, where the other partner is, from being out of the kingdom, not amenable to the court, the partner before the court is liable for the whole demand.—2 Atk. 510.

If the partners of an executor permit him to place his accounts, as executor, in the general books, it seems that they can be compelled to grant the *cestui qui trusts* a free inspection of the books.—3 Merivale, 44.

The admission by one partner, made after the partnership has ceased, is not evidence to charge the other members of the firm, in any transaction which has occurred since the dissolution; but the power of partners with respect to rights created pending the partnership, remains after the dissolution.—1 Taunt. 104.

In an action against a member of a society formed by deed, for goods supplied to the society, if the existence of the company be proved by oral testimony, and that the defendant is a member; that he has attended several meetings, and acted as chairman; it has been ruled, that the fact of the defendant's being a member of the partnership, need not be proved by the production of the deed of partnership.—1 Stark. 406.

In an action upon a joint contract, against two or more members of a firm, one of whom, who suffers ment by default, is not an admissible witness, for laintiff, to prove the partnership, although the ff produce a release of all causes of action such proposed witness, except the action then the court.—8 Taunt. 140.—4 ibid. 782.

dmission of one partner, after dissolution of the ship, of a balance due by the firm, does not e firm.—15 Johns. 409. *New York.*

etter written by one copartner, after the dissolu- of the copartnership, acknowledging the justness debt, will bind the other: for it is not in the na- e of a new contract, but the recognition of an old ne.—2 Bay, 533. *S. Carolina.*

The admissions of one partner are evidence against all, as to partnership transactions.—*Tennessee Rep.* 383.

In an action against A. B. and C. as secret partners, the declarations and acts of A. though evidence to show that he considered himself a secret partner with B. & C. are not admissible, directly, to charge or implicate B. as a partner.—10 ibid. 66.

In cases of partnership, the confession of one partner, in relation to a partnership concern, is in general admissible, in an action against the other. It is not evidence to prove the partnership itself; but that being once admitted or proved, by other evidence, the confessions are let in for collateral purposes.—2 Wash. C. C. R. 388. It is admissible to take a case out of the statute of limitations, and to establish, not merely the

amount, but the existence of a joint demand, even when made after the dissolution of the partnership.—ibid. —1 Gallis. 630.

Entries made in the partnership books, after the dissolution of the partnership, may be given in evidence against him who made them, but are not otherwise admissible.—2 Wash. C. C. R. 41.

On the general issue pleaded to an action by partners, the plaintiffs are not obliged to prove their partnership.—1 Browne, 145.

General reputation, connected with corroborating circumstances, will be sufficient, at least *prima facie*, to establish the fact, that A. was a partner with B. and C.; and if A. and B. have acknowledged the existence of articles of copartnership between them and A. which, upon due notice, they refuse to produce at the trial, the jury may reasonably infer, that, if produced, they would have shown the fact of a partnership.—14 Johns. Rep. 215.

But the mere acknowledgment of B. and C. that A. was their partner, would not be sufficient to charge him. —ibid.

Where a partnership is sworn to by the clerk of one of the partners, the books may be given in evidence, either to discredit, or to fortify his testimony.—3 Yeates, 36.

Two persons signing a joint note, is no evidence of a partnership between them.—11 Johns. Rep. 161.

SECTION V.

Of suits between partners.

Partners cannot maintain assumpsit against each other, except on an express promise.—2 Caines' Rep. 293.

Nor will covenant lie by one partner against the other, on articles of agreement. The only remedy by

partners against each other, for balances due on partnership accounts, is by bill in equity, or action of account.—12 Johns. Rep. 401.—14 ibid. 318.

If partners covenant to account, and a balance be struck, and the indebted partner promise to pay, indebitatus assumpsit lies.—2 T. R. 479.

If one partner be a member of two firms, an action of assumpsit cannot be maintained by one firm against the other, after the death of such member, for a debt due during his life.—2 Marshall, 319.—6 Taunt. 598.

It has been said, that if there be partnership dealings, and only one item remain unadjusted, the difficulty as to one partner maintaining assumpsit against another, disappears.—2 Bl. 947.

Contribution may be maintained in an action of assumpsit.—2 Bl. 947.

But an action for contribution cannot be maintained in consequence of a recovery under a judgment in an action on a *tort*.—8 T. R. 186.

If a member of a firm pay a sum which he erroneously supposes the firm is liable to pay, he is not entitled to contribution from his partners.—2 Moore, 500.

If the auditor of a benefit club, who is himself a member, be entrusted with the funds of the society for safe custody, which he applies to his own use, and refuses to pay over, and he run away with the box; the steward of the club may maintain an action against him for the amount.—6 Price, 132.

If three or more copartners enter into mutual covenants, where they contribute severally and in different proportions to their joint stock, their covenants are several, and each partner has his several remedy for a breach.—8 Mass. Rep. 462.

One partner, in a particular transaction, is not liable in assumpsit to the others, except on an express promise to pay.—2 Caines' Rep. 293.

One partner may maintain an action of assumpsit

against his copartner, after a dissolution of the partnership, to recover back money paid by mistake, on an adjustment of the partnership concerns.—12 Mass. Rep. 34.

Where one copartner took an assignment of all the debts, due to any, or all of the copartners, on the partnership account, and thereupon engaged to pay all debts due by the copartnership, he was held liable for a debt due by the copartnership, to one of the other partners.—9 Mass. Rep. 304.

Where a loss is occasioned by the act of a partner, done in good faith, although contrary to the opinion and advice of the other partner, he is not responsible for the injury.—2 Wash. C. C. R. 224.

If two persons agree to share in profit or loss upon goods brought by one of them on their joint account, an action may be maintained by one against the other, for the payment of his share.—13 East, 7.

An action may be maintained by one partner against another, for the non-performance of an agreement, as to the capital to be advanced for the formation of the partnership.

A father, established in business, on his son's coming of age told him he should have a *share* in it, and held him out to the world as his partner. The son acted as such for several years; but the particular share which the son was to have, was not settled. It was held, that, as there was a partnership as between the parties and the rest of the world, the presumption of law was, that they were partners between themselves; that this presumption not having been repelled, the son, though not entitled to a half, was entitled to a *share* of the profits; but it was left to the jury to consider what was a fair and just proportion for the father to give, and the son to expect. The jury found that the son was entitled to a fourth part of the profits.—2 Camp. 45.

One partner may maintain an action of account against his copartner.—Co. Litt. 172. o.—See Account Render.

One partner cannot maintain trover against his companion, for partnership property in possession; but trover may be maintained by one partner against his companion, upon destruction by him of the partnership property.—1 Mont. on Part. 56.

If one of three partners obtain a lease of the premises where the business is carried on, and the rent is to be paid by him to the landlord, out of his private funds; and it is agreed, that, as a compensation for the use of the shop and premises, he shall be paid equally by the other two partners, out of their own private funds, one half of the rent; it is a joint undertaking by such two partners to pay such half.—1 H. B. 236.

A court of equity will not compel the performance of an agreement for a partnership which the parties may immediately dissolve.—16 Vesey, 49.

It is not the signing, but the keeping of an account without objection, which makes it a settled account. —2 Atk. 252.

If two tradesmen agree to do a particular work, and payments on account are jointly received by them, and divided between them; and, upon a sum being due by the employer, one of the tradesmen refuse, from fear of offending their employer, to join in a suit, to compel payment; and the other tradesman apply to the employer, who is solvent, and obtain payment of his half; the tradesman who refused to join in the suit, is not entitled to an account of such half, so paid.—Mont. on Part. 60.

Doubt has been entertained, whether, if the employer be insolvent at the time of such payment, a bill for an account will not lie.—ibid.

Where there is a special agreement between the partners, as to the mode of taking the partnership accounts, upon which the partners, during the partnership, never act; it seems that the articles are to be read in a court of equity, as not containing the clause on which the parties have not acted.—1 Swans. 460.

If, by articles of partnership, it be covenanted that the accounts shall be adjusted annually, and the partners proceed, from year to year, without settling the accounts, and engage in business not contemplated by the articles; it seems that such omission and engagement are evidence of the intention of the parties to wave the agreement.—ibid.

If articles of partnership contain special covenants as to the mode in which the accounts shall be taken, but the partners engage in business not contemplated by the articles, in which the application of the covenant would work injustice; the engaging in such business affords a reason for not performing the stipulations.—ibid.

If one partner pay a partnership debt, equity will enforce a contribution.—5 Ves. 792.—1 East, 20.

A court of equity will not appoint a receiver, when the partnership is to continue, except in a case of the grossest abuse.—2 Ans. 453.

The receipt of moneys by a partner, and neglecting to enter them in the books; or the not leaving the b ooksopen for the inspection of the other partner; is a ground for serious complaint.—1 J. & W. 592.

A court of equity may restrain a partner who has acted improperly, from doing certain things in future, without appointing a receiver.—ibid.

An agreement to refer, is not any bar to an action for a cause of action within the terms of the agreement.—1 Wils. 129; nor will a court of equity compel a specific performance of a covenant to refer.—2 Bos. & Pul. 131.

To a bill filed by one partner against another for discovery and relief, and for discovery in aid of an action at law, the defendant cannot plead an agreement to refer partnership differences to arbitration.—2 Atk. 569.

If the means of redress provided by the articles are

not effectual, a court of equity will interfere.—18 Vesey, 159.

SECTION VI.

Dissolution of partnership, by death, limitation of articles, consent, bankruptcy, or otherwise; its consequences to the parties, and also to third persons.

A partnership, unlimited as to time, is dissoluble at the will of either party.—3 Ves. 74.

A partnership constituted by deed must be dissolved by deed.—Holt, 370.—1 Starkie, 182.

A partnership may be continued after death, by the agreement of the parties.—11 Serg. & R. 41.

If either of the partners be in such a state of mind, as to render him permanently incapable of transacting his share of the partnership business, the partnership is, as it seems, dissoluble.—2 Ves. & Beames, 303.

But one partner cannot, on account of the lunacy of another, put an end to the partnership: it must be dissolved by bill.—ibid.

A partnership for a term of years, is dissolved by the death of one partner, before the expiration of the term.—3 Madd. 248.

A partner cannot, by will, leave his interest to a legatee; but if he do so direct in his will, the surviving partner cannot, if he claim a benefit under the will, refuse to admit the legatee.—1 Swans. 509.

If a partnership be formed for carrying into effect a new invention, which, after repeated trials, is found impracticable, it seems that the partnership is dissoluble.—1 Mont. on Part. 117.

Misconduct of a partner, which is not of such a nature as to defeat the object for which the partnership was formed, seems not to be a sufficient cause for dissolving a partnership.—ibid.

It seems, that a sale under a separate execution, is a dissolution.—2 Ves. & Beames, 300.

It has been said, that the bankruptcy of a partner is a dissolution of the partnership. But doubts have been entertained whether such a dissolution of a partnership as is occasioned by bankruptcy is caused by the act of bankruptcy, or by the assignment.—ibid.

It seems to have been decided, that a member of a firm may insist upon his own bankruptcy as a cause for dissolution of a partnership.—ibid. 119.

Where all matters in dispute between two partners, are referred to an arbitrator, he may direct the partnership to be dissolved.—1 Blacks. 475.

On the dissolution of a partnership, any partner may insist upon a sale of the whole concern, and a division of the produce in proportion to the several interests of the partners.—15 Ves. 221.

The dissolution of a partnership cannot affect the rights of third persons.—4 Yeates, 337.

A firm may be bound after the dissolution of the partnership, by a contract made by one partner in the name of the firm, with a person who contracted on the faith of the partnership, and had not notice of the dissolution.—1 Esp. 371.—5 East, 225.

It seems that, in England, an advertisement in the Gazette is sufficient notice to all persons who had not previous dealings with the house; notwithstanding that the remaining partners carry on business in the firm of the old house.—1 Mont. on Part. 128.

But without an advertisement, the remaining partners will be liable to new creditors.—3 Esp. 248.

An advertisement in the Gazette seems not to be sufficient to protect the several members of the firm from the dealings between any one of the members and a customer who has not notice of the dissolution.—1 Starkie, 420.

The best mode to publish the dissolution, is to advertise in the Gazette, and to give notice to every customer of the house.—ibid.

Notice of dissolution published in Gazettes which are proved to be taken in by the holder of a note, was held to be tantamount to express notice.—1 M'Cord, 389.

It has been ruled, that a retiring partner is liable, after a lapse of seven years, when no notice was advertised in the Gazette, and the dissolution was not known to the creditor, although it was generally known in the neighbourhood.—Peake, 42.

If a partnership between persons residing in different countries for commercial purposes, expire by its own limitation after the breaking out of a war between those countries, the existence of the war dispenses with the necessity of giving public notice of the dissolution.—15 Johns. 57.

Where a partnership existed between A. and B. of New York, and C. of Norwich, Conn. which was dissolved, and notice thereof was published, for several weeks successively, in two newspapers—one printed at Norwich, their usual place of business, and the other at New London—and B. afterwards endorsed a bill of exchange in New York, with the company's name: Held, that this notice was sufficient, it not appearing that the endorsee had ever been a correspondent of the company.—3 Day, 353.

If the notice of dissolution authorize either partner to receive and pay partnership debts, it is not an authority to such partner to bind the firm by a bill of exchange.—1 H. Bl. 155.

If, after the dissolution of a partnership, a bill be accepted by one of the partners, in the name of the firm, and dated on a day anterior to the dissolution, the firm is not liable.—1 Starkie, 376.

Acts and admissions made by one of several partners, notwithstanding the dissolution of the partnership, will continue obligatory on the others until due notice of the dissolution.—3 Litt. 425.

After notice of dissolution, and that all debts are to

be paid to the remaining partner, a payment to the outgoing partner is invalid.—2 Camp. 561.

If the executors of a deceased partner continue his share of the partnership property in trade for the benefit of his infant; and the partnership business is continued, and the executors divide the profit and loss with the partners, but solely for the benefit of the infant, the executors are partners.—1 Maule, 412.

It has been ruled, that, after the dissolution of a partnership, either partner may revoke an authority, given, at the dissolution, by both partners, to an agent to receive the partnership debts.—2 Starkie, 50.

If, after the admission of new partners, there are dealings between the new firm and a customer of the old house, and payments are made by him, and the account is continued with an alteration of the partner's name, it seems that such payments are to be carried to the old account.—3 East, 488.

If the children of a partner are to succeed to the share of a parent, the surviving partner is not, without express stipulation, entitled to an allowance for his management of the trade after the death of the testator.—18 Ves. 172.

A surviving partner, who is executor of the deceased partner, is not entitled to any allowance for his management of the trade after the death of the testator. —ibid.

If, upon the dissolution of a partnership, the remaining partner covenant to pay the partnership debts, and to indemnify the outgoing partner, and, at the death of the remaining partner, partnership debts are unpaid, which the outgoing partner is compelled to pay, he is, by virtue of his covenant, a specialty creditor.—3 Ves. & Beames, 194.

A bill drawn in blank by a partner, which is filled up after his death, binds the firm.—4 Camp. 97.

On the death of a member of a firm, the right of action is in the survivor.—1 Mont. on Part. 141.

A dissolution of a partnership, by the death of one of the partners, or otherwise, and an adjustment of the partnership concerns, will not be such a severance of a joint demand in favour of the partnership, as will entitle either partner, or his executor or administrator, to sue alone for the balance, without the consent of the debtor to such severance; but all the partners, if living, must join in the action; or, if any of them be dead, the action must be brought by the survivor or survivors.—7 Mass. Rep. 257.—2 ibid. 405.

The representative of a deceased partner cannot be sued, while there is a surviving partner.—2 Car. Rep. 124.—1 Taylor, 124.

A surviving partner may assign the effects, debts, &c. of the co-partnership to a third person, in the name of the co-partnership, for the purpose of paying and settling the debts of the firm.—1 Nott & M'C. 557.

Stock on a farm, held by two persons jointly, for their mutual advantage, does not vest in the survivor, to the exclusion of the representatives of the deceased. —4 Har. & M'Hen. 231.

On the death of a partner, a creditor of the partnership has an equitable right upon his estate, and, as it seems, *pari passu* with the other separate creditors, according to the degree of priority.—1 Mont. on Part. 144.

A court of equity will, as it seems, when necessary, appoint a person to carry on a trade for the benefit of an infant partner.—Mont. on Part. 167.

If an infant partner do not, upon his attaining the age of twenty-one, notify his discontinuance of the partnership, he is liable, as a partner, for goods supplied after he attains that age.—5 B. & A. 157.

It is a gross fraud for an adult, knowing his partner to be an infant, to issue a bill with the infant's name for the purpose of availing himself of the objection. —3 Taunt. 313.

SECTION VII.

Of Part Owners.

Part owners are tenants in common of the ship. —Abbot, 94.

Partners are, at law, joint tenants of their merchandize: one may dispose of the whole property; but part owners are tenants in common of the ship:—one cannot sell the share of another.—ibid.

All the part owners are liable upon a contract made by one part owner for the repairs of, and necessaries for the ship.—1 Ves. 457.

If the creditor were ignorant, at the time of the contract, that there were other part owners, he may sue him alone to whom the credit was given.—Mont. on Part. 149.

A direction to insure, given by one part owner, does not bind the other part owners. But there is such authority in part owners who are also partners.—ibid.

The majority or equality in value of ship-owners, may employ the ship in any probable design, upon giving security either to restore the ship, or to pay to the dissentient part owners the value of their shares. —ibid.

If the minority in value are in possession of the ship, and refuse to employ it, the majority may, by a warrant from a court of admiralty, and giving the requisite security, obtain possession, and send it to sea. —Abbot, 57.

Part owners who dissent from a voyage, do not bear any proportion of the expenses of the outfit, nor are they entitled to any share of the profits.—ibid. 35.

One part owner cannot maintain trover against another, for a detention of the ship.—4 East, 121.

But if one part owner destroy the ship, trover may

be maintained against him by the other part owners. —ibid.

The continuance of a part owner's name on the register of a ship, after his interest has ceased, seems not to be evidence of a continuation of his liability.—16 East, 176.

CHAPTER XIII.

PRINCIPAL AND AGENT.

SECT. 1. Of the nature of the employment of a factor, &c.

2. His power and authority.

3. His lien on the property of his principal.

4. Lien of the principal on his property in the hands of the agent; and his general rights against third persons.

5. Liability of an agent to his principal.

6. Liability of the principal for the misconduct of his agent.

7. Revocation of the power of an agent.

8. Actions by or against the agent; and herein how far the principal may maintain an action for the price of goods sold by a factor.

9. Rights of the principal against third persons.

10. Evidence.

SECTION I.

Of the nature of the employment of a factor, &c.

A FACTOR or broker is an agent, who is commissioned by a merchant or other person to sell goods for him, and to receive the produce.

A factor is usually paid for his trouble by a commission of so much per cent. on the goods sold. But sometimes he acts under a *del credere* commission; in which case, for an additional premium, beyond the usual commission, he undertakes for the credit of the persons to whom he sells the goods consigned to him by his principal:—in other words, for a *del credere* commission, *he insures the debts.*

"*Del credere*" is an Italian mercantile phrase, which has the same signification as the Scotch word *warrandice* or the English word *guarantee.*

An agent for the collecting of debts merely, is not a factor, within the meaning of the 13th sect. of the Virginia act of limitations.—3 Cranch, 454.

SECTION II.

His power and authority.

A factor, as such, has not any authority to *pledge*, but only to *sell* the goods of his principal.—Strange, 1178.

Hence, if a factor pledge the goods of his principal, the latter may recover the value of them in trover, against the pawnee, on tendering to the factor what is due to him, without making any tender to the pawnee. —5 Term. Rep. 604. 2 Mass. Rep. 398.

The same rule holds, with respect to a bill of lading, which has been endorsed by a factor to his principal; for, the bill of lading, which is the symbol of the delivery of possession, cannot give a factor a greater authority than the actual possession of the goods themselves. Hence, as a factor cannot pledge the goods of his principal, by a delivery of the goods, so neither can he do it by an endorsement and delivery of the bill of lading; for although the endorsement of a bill of lading gives the endorsee an irrevocable right to receive the goods, where it is intended as an assignment of the property in the goods, yet it will not have that operation, where it is intended as a deposit only, by a person who is not authorized to make such a deposit.—6 East, 17.

In the case cited, as an authority for this position, the party to whom the factor had pledged the bill of lading, had not any notice that he was dealing with a factor. The endorsement by the principal, was a general endorsement; but it was observed by Lawrence, J. that the letter of advice which brought the bill of lading, might have been inquired for, and *that* would have shown that the person who pledged the bill was *factor* only, and not *vendee* of the goods.

But, though a factor cannot pledge the goods of his principal, he may deliver the possession of goods, on which he has a lien, to a third person, with notice of the lien, and with a declaration that the transfer is to such person as agent of the factor, and for his benefit: and the lien of the factor is not lost by such transfer.—4 Johns. Rep. 103.

Where a factor pledges the goods of his principal, as his own, the pawnee cannot claim to retain against the principal for the amount of the factor's general lien at the time of the pledge;—7 East 5; and if the factor pledge the goods of his principal, it is a conversion.—14 Johns. Rep. 128.

The rule is, that a factor cannot pledge the goods of his principal for his own debt.—6 Serg. & R. 392.

But where a merchandize broker, to whom goods were delivered by his principal for sale, deposited them for sale, in the usual course of business with a commission merchant connected with a licensed auctioneer, who advanced his notes thereon, it was held that the principal was bound.—Ibid. 386.

The goods of a principal may be levied on for *rent*, in the store of a factor, or in any other store, if there be not on the premises sufficient property belonging to the tenant. But they cannot be followed to *another* place, for arrears of rent, as those of the tenant himself may for a limited time.

A factor or agent cannot appropriate money of his principal in the hands of another, to pay off a debt due by himself or a third person, the creditor having full

notice that the money belongs to the principal.—1 W. C. C. R. 479.

Where goods are permitted to remain at a wharf in the name of a broker who is accustomed to deal in the article, and the broker sells them, the principal will be bound by such sale, although he did not expressly authorize the broker to sell.—15 East, 38, 400.

A factor may sell on credit, although not expressly authorized, by the terms of his commission, so to do.—Willes, 406.—3 Bos. & Pul. 489.

If a supercargo, who has received no express instructions from his principal, as to the consignment of the proceeds, consign them fraudulently to the owner of the vessel, with a view to secure to him a debt due by the principal, the owner of the vessel is not entitled to any lien in consequence of such consignment.—6 Serg. & R. 300.

An agent employed generally, to do any act, is authorized to do it only in the usual way of business. Hence, as *stock* is sold for ready money only, a broker employed to sell stock, cannot sell it upon credit, without a special authority, although acting bona fide, and with a view to the benefit of his principal.—1 Camp. 258.

The rule is, that where the instructions are to sell, without any special instructions to sell for cash, the agent selling on a usual credit, to a person known and approved in the market, is not responsible for the solvency of the vendee.—6 Johns. Rep. 69.—3 Johns. 317.—7 Mass. Rep. 36.

Hence, it is evident, that, if the principal, on inquiry, has reason to suppose that the factor sold to a person *not* "known and approved in the market," he may bring an action against the factor, and show, by the testimony of merchants, that the vendee was not generally considered trust-worthy, at the time of the sale. In this case I conceive that the proof would lie with the principal, as the law would presume that the factor had acted rightly, until the contrary were shown.

Where a power is general, the attorney, [agent, or factor,] may do any thing to bind his principal, which is within the scope of his authority. But, if it be special, every thing is void if he does not act in strict conformity to his authority.—1 W. C. C. R. 174.

Every general power necessarily implies the grant of every matter necessary to its complete execution. An attorney who has power to convey land, has necessarily the power to receive the purchase money.—6 Serg. & R. 149.

The unauthorized act of an attorney, [agent, or factor,] is not so absolutely void, that his constituents may not ratify it, and give it validity.—1 Peters' Rep. 72.

Where A. B. & Co. consigned goods to their factors, who, not having funds to pay the freight and duties, agreed with C. D. & Co. that they should take charge of the consignment, pay the freight and duties, and sell the goods, and have one half the usual commission on such sale; and C. D. & Co. accordingly paid the freight and duties, and received the goods, after which the factors became bankrupt, having before informed defendants, that the goods were the property of A. B. & Co.; but C. D. & Co. notwithstanding sold the goods: held, that in trover by A. B. & Co., C. D. & Co. had not a right to retain for the freight and duties after deducting the balance due by the factors to A. B. & Co. at the time of the bankruptcy.—2 M. & S. 298.

Where C. consigned goods to M. his broker, upon a *del credere* commission, for sale, and drew bills on him, in advance, which M. accepted, but never paid, and afterwards, without the knowledge of C., placed the goods with H. another broker, upon a *del credere* commission, and upon an agreement to divide the commission with him, obtained his acceptances for the amount, and H. sold the goods, and afterwards became bankrupt, and his assignees received the proceeds of those sales, and the acceptances of H. were proved under his commission, and a dividend received upon them: held, that the assignees of H. were liable to the assignee of C,

who had also become bankrupt, for the amount of the proceeds, in an action for money had and received.—2 M. & S. 301.

If goods are bought by a broker, who does not mention the name of his principal, until he (the broker) has become insolvent, the principal cannot set off the price of the goods against a debt due to him by the broker, but is still liable to the vendor.—1 Camp. 85.

But where a factor, acting under a *del credere* commission, sells goods as his own, and the buyer does not know of any principal, the buyer may, in an action brought against him by the principal, set off a debt due to him by the factor.—7 Term. R. 359.—1 M. & S. 576.—2 Camp. 343.

It is to be observed, however, that there is a distinction between a *factor* and a *broker*. A factor is a person to whom goods are consigned for sale by a merchant residing abroad, or at a distance from the place of sale, and he usually sells in his own name, without disclosing that of his principal; the merchant, therefore, with full knowledge of these circumstances, trusts him with the actual possession of the goods, and gives him authority to sell in his own name. But the broker is in a different situation: he is not trusted with the possession of the goods, and he ought not to sell in his own name. The principal who trusts a broker, has a right to expect that he will not sell in his own name. Hence, where an action was brought, by a merchant, to recover the price of his own goods, and the demand was resisted, on the ground that the defendants, who were buyers of the goods, did not purchase them from the plaintiffs, but from Coles & Co., and that they had a counter demand against Coles & Co. which they were entitled to set off against the price of the goods, it was held, that the defendants had not any right to set off; for the plaintiff had not enabled Coles & Co. to appear as proprietors of the goods; and although Coles & Co. had not disclosed the name of their principal, and were merchants as well as brokers, yet, in this case, they had delivered to the plaintiffs a sold note, in the proper

form, supposing them to have sold in their character of brokers, and they had delivered to the defendants a bought note, and they had not taken any counter note from the defendants: there was enough, therefore, to have raised a strong presumption in the minds of the defendants, that the sale was in the character of brokers. Coles & Co. did not say that they sold the goods as their own; the defendants did not ask any questions; and further, it appeared that the delivery order had been signed by the plaintiffs.—1 Wheaton's Sel. N. P. 603.

Where a factor to a person beyond sea, buys or sells goods for the principal, in his own name, an action will lie against him or for him, in his own name; for the credit will be presumed to have been given to him in the former case, and in the latter the promise will be presumed to be made to him, and the rather so, as it is so much for the benefit of trade.—Bull. N. P. 130.

Where the principal resides abroad, he is presumed to be ignorant of the circumstances of the party with whom his factor deals, and therefore the whole credit is considered as subsisting between the contracting parties.—3 Bos. & Pul. 490.

"There may be a particular course of dealing with respect to trade in favour of a foreign principal, that he shall not be liable in cases where a home principal would be liable."—Per Bayley, J. 15 East, 69.

In Soland v. Murray.—18 Johns. Rep. 24; it was decided, that where goods were assigned by A. residing at Cadiz, to B. at Philadelphia, but the ship arrived at New York, and B. directed C. of New York to sell them, B. the factor, might maintain an action in his own name, against C. although it appeared that B. was a part owner of the goods, and that they were consigned to him for the joint interest of himself and A.—Where A. consigned goods to B. for sale, and B. sent them to C. to sell, and C. promised to account with B. for the proceeds, but, after selling them, promised to account with A. it was held that A. might maintain an action

against C. notwithstanding his liability to B.; for, not having had any notice of B's having a lien, payment to A. would discharge him from any claim which B. would have against him.—12 Mass. Rep. 183.

In an action for goods sold, the defendant pleaded, that one J. R. carried on trade, by the plaintiffs, under their name and firm, but in truth for his own profit, and on his own account and risk; and that J. R., by the plaintiffs, under their firm, sold and delivered the goods, &c. and a set-off of a debt due by J. R. to the defendant. The court remarked, that it appeared from the plea that the suit was well brought in the name of the plaintiffs; for it admitted that they were authorised to sell the goods in their own names; that the promise would, therefore, be presumed to be made to them, and that they had the right to receive the money, to discharge the buyer, and to compel payment.—10 Johns. Rep. 396.

A. an agent, procured a policy of insurance for his principal in his own name, but the name of his principal was mentioned in the policy, and the agency of A. was known to B. the broker, who had the policy effected. B. having recovered on the policy, the principal brought an action against him for the money received, and he was not allowed to set off a debt due to him by A. the agent.—2 Johns. Cas. 327.

The law has been settled, by a variety of cases, that an unknown principal, when discovered, is liable on the contracts which his agent makes for him: but this rule must be taken with some qualification; for a party may preclude himself from recovering over against the principal, by knowingly making the agent his debtor. —15 East, 68.

Goods sold by a broker for a principal not named, upon the terms, as specified in the usual bought and sold notes (delivered over to the respective parties by the broker) of "*payment in one month, money*," may be paid for, by the buyer, to the broker, within the month, and that payment may be made by a bill of exchange

accepted by the buyer, and discounted by him within the month, although such bill had a longer time to run before it became due.—11 East, 36.

A mere attorney or agent to collect debts, having no beneficial interest in the money, cannot sue in his own name. As, where, an attorney, received from G. the agent of S. an obligation to collect money thereon for the use of S., an action could not lie against C. by G. in his own name, for the money collected.—10 Johns. Rep. 387.

The agent who makes insurance for his principal, has authority to abandon, without a formal letter of attorney.—6 Cranch, 268.

All contracts made by the authorized agents of a corporation, within the legitimate scope of its institution, are binding upon the corporation.—7 Cranch, 299.

The United States are not bound by the declarations of their agent, founded upon a mistake of fact, unless it clearly appear that the agent was acting within the scope of his authority, and was empowered, in his capacity of agent, to make such a declaration.—7 Cranch, 360.

When an agent abroad, purchases exclusively on the credit of his principal, or makes an absolute appropriation and designation of the property for his principal, the property vests in the principal immediately on the purchase.—1 Wheat. 208.

But, when a merchant abroad, in pursuance of orders, either sells his own goods, or purchases goods on his own credit, and thereby in reality becomes the owner, no property in the goods vests in his correspondent, until he has done some notorious act to divest himself of his title, or has parted with the possession by an actual and unconditional delivery, for the use of such correspondent.—ibid.

Where a check was drawn by a person who was the cashier of an incorporated bank, and it appeared doubtful upon the face of the instrument, whether it

was an official or a private act, parol evidence was admitted, to show that it was an official act.—5 Wheat. 326.

The liability of the principal depends upon the facts, *first*, that the act was done in the exercise of, and *secondly*, within the limits of the power delegated. —ibid.

In case of loss and abandonment, the master becomes the agent of the underwriters.—ibid.

An agent or trustee cannot, directly or indirectly, become the purchaser of property which is confided to his care.—1 Mason, 341.

A cashier of a bank has, *prima facie*, authority to endorse, on behalf of the bank, the negotiable securities held by it; and any restriction on his authority must be proved.—3 Mason, 505.

An agent, authorized to collect a debt, cannot commute it for a debt due by himself to the debtor, by exchanging one for the other.—1 Wash. C. C. R. 455.

The unauthorized act of an agent or attorney is not absolutely void, as the principal may ratify it, and give it validity.—1 Peters' C. C. R. 64.

Where A. authorized B. to sign the name of A. to a promissory note for 250 dollars, at six months, and B. put A's name to a note for that sum, payable in sixty days, it was held that A. was not liable on the note.—2 Johns. Rep. 48.

A power to sell, does not, of itself, give the power to warrant the *title* of the thing sold.—7 ibid. 390.

If a deed be executed by an attorney, his power must be produced.—Taylor, 25.

A power of attorney to convey lands should be proved or acknowledged, and left to be recorded in the same manner as the conveyance itself; and the clerk has power to take such proof or acknowledgment.—3 Marsh, 44.

A general power of attorney granted to one partner, does not give any authority to the others.—1 Camp. 88.

A factor has no right to send away goods to another person, when they have been consigned to him for sale at a particular place, though he is unable to sell them there.—4 ibid. 183.

If a tradesman, living in the country, receive goods, ordered on his behalf by a person in London, and pay for them in several instances, he is liable for goods furnished on an order given by such person afterwards, though he did not receive them, such person having appropriated them to his own use.—1 C. & P. 642. —1 R. & M. 226.

A person who has several times allowed an agent to subscribe policies in his name, is bound by such signature; and evidence of his so having allowed it to be done, is sufficient, in all actions against him on the policy, without producing a power of attorney.—1 Esp. 61.

So, the owner of a ship is bound by the representations of his broker, who put up the ship at the royal exchange, and at the coffee-house, as a general ship warranted to sail with convoy, and distributed handbills to the same effect.—3 Esp. 64.—2 Camp. 556, n.

If goods be bought by a broker, the principal is liable to the vendor, if called upon when payment becomes due; although he may have previously paid the broker: otherwise, if the day of payment be allowed to pass, without any demand being made upon the principal. —1 Camp. 1091.

Where the broker does not mention his principal, until he himself has become insolvent, the principal cannot set off the price of the goods against a debt due to him by the broker, and is still liable to the vendor.—1 Camp. 85.

Where an agent tendered the amount of a note for his principal, on condition of having the note given up,

which could not be done from its being mislaid, and afterwards failed with the money in his hands: Held, that the principal was liable on the note, but without interest from the time of the tender.—3 Camp. 296.

If a committee of the directors of a turnpike corporation, covenant to pay money, and in the covenant name themselves individually, with a description that they are a committee of the directors, and stipulate that they will make the payments agreed on, not in behalf of the corporation, but of the president and directors, who are officers and agents of it; the committee will be personally liable on their covenant. It differs from the case of a public agent, contracting to pay in behalf of the public.—4 Mass. Rep. 595.

Persons acting as managers or agents of an association not incorporated, not being members, and having no interest, are not liable for the company debts contracted by them as managers, unless by acting fraudulently, exceeding their authority, or by receiving money without accounting for it.—1 Bibb, 320.

The acts of a member of a committee for the election of a member of parliament, are such as will bind the principal.—6 Esp. 119.

A merchant's clerk cannot sign promissory notes for his principal, without special authority for that purpose. —10 Johns. Rep. 114.

If a factor, employed to sell rice or other produce, and to purchase goods with the proceeds, take up goods on credit for his principal, the latter is not bound, but the merchant who gives the credit must look to the factor.

A. a merchant, purchases goods from B. for the use of C. who is present and selects the goods, and stipulates with B. the price and other terms of the purchase. A. credits B. with the amount, and debits C. with the amount and a commission. B. credits A. in his books and invoices, B. cannot recover the price of the goods against C.—4 Taunt. 574.

SECTION III.

His lien on the property of his principal.

By the general usage of trade, where there is a course of dealings and general account between the merchant and factor, and a balance is due to the factor, he has a lien on all goods in his hands, for such balance of the general account, without regard to the time when, or on what account, he received the goods. —Amb. 252.—1 Burr. 494.—6 East, 28.

There are two species of liens known to the law;—namely, particular liens, and general liens. Particular liens are, where persons claim a right to detain goods in regard to labour, or money expended on such goods; and those liens are favoured in law. General liens are claimed in respect of a general balance of account; and those are founded in custom only, and are therefore to be taken strictly.—Per Heath, J.—3 Bos. & Pul. 494.

With respect to this general lien, it is to be observed,

First, That it will not attach until the goods come into the possession of the factor.—3 T. R. 119, 788.

Secondly, The lien exists during such time only as the factor has possession of the goods; for, if he should part with the possession after the lien has attached, the lien is gone.—1 East, 4.—6 East, 27, n.

It is to be observed, however, that, where a factor is in advance for goods, by actual payment, or where he sells under a *del credere* commission, whereby he becomes responsible for the price, he has a lien on the price, although he should have parted with the possession of the goods.—Cowp. 251.—4 Johns. Rep. 103.

This rule holds, although money should have been advanced by the factor, at the time when he knew that the principal was in insolvent circumstances.—2 Burr. 931.

But, where a factor has not any special claim on the goods, and he has disposed of them, whereby he has lost the advantage arising from possession, the debt is to be considered as the debt of the principal, and the factor has no lien on the price.—ibid.

Thirdly, A factor has not a lien in respect of the debts which have accrued previously to the time at which his character of factor commenced.

A., a factor, sold the goods of B. in his own name, to C: C., without paying for these goods, sent another parcel of goods to A. to sell for him, not having employed A. as a factor before. C. became bankrupt, and his assignees claimed the goods sent by C. to A. which still remained unsold, tendering the charges upon these goods. A. refused to deliver them, claiming a lien upon them for the price of the former goods sold by him to C., the balance between A. and B. being in favour of A. An action of trover having been brought by the assignees against A. for the value of the goods sent by C. it was held, that they were entitled to recover.—3 Bos. & Pul. 485.

An agent who effects insurance for his principal, and pays or becomes answerable for the premium, has a lien on the policy, so long as he retains it; but if he delivers it up, his lien is gone.—5 Binn. 538.

Though a factor has a lien on the goods of his principal, yet he cannot retain against the order of his principal a large portion of the goods, though he may retain as much as will be sufficient to pay his debt.—1 W. C. C. R. 552.

A broker, purchasing goods for his principals without their knowledge, adds to the terms of purchase which the principals had agreed to, a guarantee by himself of their bills: the goods were delivered to the broker, and the principals became bankrupts: Held, that the broker could neither detain the goods as upon a stoppage *in transitu*, nor had he any lien on them for the money which he had paid on his guarantee.—4 Taunt. 242.

Where an agent has a general authority to receive and sell goods, and, out of the proceeds, to repay himself his advances, charges, and commissions; the costs of an action, and a reference thereof, against a wrongdoer, who withholds the possession of the goods, *bona fide* incurred for the recovery of the goods, are legal charges upon the goods, and may be set off by the agent, in an action brought against him by his principal, for the balance of the proceeds of the goods.—7 D. & R. 539.—5 B. & C. 141.

SECTION IV.

Lien of the principal on his property in the hands of the agent; and his general rights against third persons.

Wherever the property of the principal can be specifically distinguished from that of the factor, it has been uniformly determined that the right of the former shall prevail over the possession of the latter.—2 Dall. 67.

But if a factor sells the goods consigned to him, receives the money due upon the sales, and mixes it indiscriminately with his own cash, the right of the principal is gone.—ibid.

Where the factor sold the goods of his principal, and took bonds from the debtors, in his own name, for the price of the goods, and afterwards became bankrupt, it was held, that the principal was entitled, at law, to the amount secured by the bonds, to the exclusion of the general creditors.—2 Dall. 60.

If an agent or factor sell the goods of his principal, and invest the proceeds in other property for the use of his principal, or mark the proceeds, and put it away as belonging to his principal, the latter has a right thereto, and is entitled to the profits made from it for his account, either against the factor or his general creditors.—2 W. C. C. R. 212.

But, if the factor applies the money to his own use, charging himself with the amount in account with his

principal, the money cannot be specifically followed. —ibid.

If a factor takes a note, in his own name, for a debt due to his principal, the note belongs to the principal, in case the factor afterwards becomes bankrupt.—1 Yeates, 540.

It has been ruled in equity, that if one employs a factor, and entrusts him with the disposal of merchandise, and the factor receives the money, and dies indebted in debts of a higher nature, and it appears in evidence that this money was vested in other goods, and remains unpaid, those goods shall be taken as part of the merchant's estate, and not the factor's. But if the factor have the money, it shall be looked upon as the factor's estate, and first answer the debts of superior creditors, &c.; for, as money has no "ear-mark," equity cannot follow that in behalf of him who employed the factor.—Salk. 160. pl. 13.

Bills remitted by the principal to his factor, while unpaid, are in the nature of goods unsold, and, if the factor become bankrupt, the principal may recover them in an action for money had and received, subject to such lien as the factor may have upon them.—2 Bl. Rep. 1154.

When a factor who has a *del credere* commission, and besides acting as a factor buys and sells on his own account, sells goods as his own, and the purchaser knows nothing of any principal, the purchaser has a right to consider the factor, to all intents and purposes, as the principal; and may set off a demand which he has against him in an action brought by the principal for the price of the goods.

But, where goods are purchased of a factor, *scienter* (that is *with knowledge*) with intent, by the purchaser, to set off against the purchase a demand which he may have against the factor, the principal may, in such case, and as on a sale made immediately by himself, have a suit against the purchaser, at any time before payment to the factor; every purchase so made, with intent

solely thereby to obtain payment or security from the factor, being, as against the principal, fraudulent.

SECTION V.

Liability of an agent to his principal.

If the commission be general, as "to dispose, do, and deal therein, as if it were your own," hereby the factor is excused if a loss happens; but if the commission be to *sell and dispose*, hereby the factor is not enabled to sell upon credit; nor can he sell for an unreasonable time, as ten or twenty years, though there be the words "as if it were your own," but he must sell according to the usual time for which credit is given upon the commodities which he disposes of. —Molloy, 422.—Buls. 103.

A factor must pursue the orders given to him: he will be responsible for any injury consequent upon his departing from them.—4 Bac. Abr. 599.

So, a merchant who accepts a consignment, though not obliged so to do, is answerable, if he do not observe the orders given, for a loss which ensues.—4 Dall. 389.

But a factor who is not particularly instructed, but in whom a discretion is vested, is entitled to protection, so long as he acts according to the best of his judgment, and is innocent of fraud and of gross abuse of the confidence placed in him. If a loss ensue, from mistake or error of judgment, where there is no improper concealment or gross negligence, his principal, and not he must bear it.—3 Cain, 226.

In cases where a factor has rendered himself liable, in the first instance, for misconduct, he is discharged from the responsibility, if the principal adopts his acts. —1 John. Ca. 110.

A factor may sell on credit, where that is the usage and course of trade at the place of sale; and he will not be responsible for a loss by the insolvency of the purchaser, if the purchaser was a person in fair credit. —4 Bac. Abr. 599.

If a factor sell on credit, and take a bond for the amount, blending with it another sum due to himself, the principal is not obliged to wait till the factor has recovered the money, but may sue the factor at once. —1 W. C. C. R. 399, 445.

If goods be consigned to a factor, and upon arrival he makes a false entry at the custom-house, or lands them without paying the customs, whereby they become forfeited, and are seized, whatever the principal hereby suffers, the factor must inevitably make good, although his commission was general.—4 Bac. Abr. 599.

If a factor, authorized to remit by good bills of exchange or merchandize, as he should think best, make a remittance by bill,—if the drawer was in credit when the bill was taken, the factor will not be liable, though the bill should afterwards prove bad.—2 Dall. 136. n. —4 Dall. 136.

If the principal gives orders to his factor, they must be pursued, or he becomes liable; but if none are given, or they are not clear and explicit, the factor is allowed to use his best discretion, according to the usage of trade.—1 Yeates, 486.

A deviation from orders may be justified, by the existence of a state of things not contemplated at the time the orders were given.—4 Binn. 361.

If a factor sell under a *del credere* commission, and guarantee the debts, his guarantee extends only to the sales and receipt of the money. If, therefore, he receive the amount of sales, and remit by a bill of exchange which is protested, he is not liable: Otherwise, if he receive payment by a bill which is protested.—2 W. C. C. R. 151.

No man can compel another to render him acts of friendship or service, whether gratuitously or with a view to a remuneration. But if the person applied to consents to render the service, and undertakes the business, he is bound to act in conformity with the terms on which the request was made.—1 W. C. C. R. 152.

If a person who is under no obligation to execute an order of insurance, yet undertakes it, and executes it defectively, and differently from the plaintiff's direction, he is answerable for the consequences.—6 Binn. 308.

An agent is bound to make insurance according to the order of his principal: 1. Where the principal has funds in his hands. 2. Where the principal consigns goods to him, and he accepts the bill of lading. 3. Where he has been in the practice of insuring for his principal. —ibid.

If the agent means not to make insurance, he must give timely notice.—2 W. C. C. R. 132.—ibid. 203.

A merchant ships to his factor abroad, a cargo of cotton, and encloses him an invoice, directing him to sell, on arrival, if the price should be such as to cover first cost and charges. If the factor sells for less than the invoice price, he is liable.—3 W. C. C. R. 151.

The factor, in this case, cannot justify selling below the invoice price, even to reimburse himself the amount of a bill drawn by his principal upon him, and paid by him as an advance upon the consignment.—3 W. C. C. R. 151.

An agent who places his principal's funds in the hands of a third person, subject to his principal's drafts for the amount, is not liable for a loss of the funds by the insolvency of the depository, if he has exercised reasonable prudence in the choice of the depository.—6 Serg. & R. 290.

As the authority and trust reposed in factors is very great, so ought they to be provident in their actions for the benefit of their principals; and therefore, if a factor shall give time to a man for payment of moneys contracted on sales of his principal's goods, and, after the time is elapsed, he shall sell goods of his own to such persons for ready cash (leaving his principal's unreceived) and then such men break and become insolvent, the factor, in equity and honesty, ought to make good the losses; for he ought not to dispense with the

non-payment of his principal's moneys, after they become due, and procure payment of his own, to another man's loss.—Winch. 24, 25.

Goods consigned to factors, ought, in honesty, to be carefully preserved; but if a factor be robbed, in an account brought against him by his principal, the same shall discharge him.—Cok. lib. 4. fol. 84.—For further information upon this head, see BAILMENT.

A factor should always be punctual in the advices of his transactions, in sales, purchases, affreightments, and more especially in drafts by exchange; for, if he sells goods on trust, without giving advice thereof, and the buyer breaks, he is liable to an action for his neglect; and if he draws, without his advising his having so done, he may justly expect to have his bill returned protested, to his no small detriment and discredit.—1 Lex. Mer. 47.

If a factor, in conformity with a merchant's orders, buys with his money, or his credit, a commodity which he shall be directed to purchase, and, without giving advice of the transaction, sells it again to profit, and appropriates to himself the advantage, the merchant shall recover it from him, and, besides, have him amerced for his fraud.—ibid.

Where U. consigned a ship and cargo to M. and informed him that he had drawn bills upon him to a certain amount, and M. accepted the consignment and agreed to accept the bills when offered, but afterwards refused one of the bills, which was returned protested, it was held that M. was liable to the damages, interest, and costs, attending the protest for non-acceptance of the bill protested.—4 Johns. Rep. 104.

One who voluntarily undertakes to perform a particular piece of business for another, though gratuitously, is bound to obey the orders of his principal, and is liable in damages for the consequences of a breach of instructions.—1 Wash. C. C. R. 152.

An agent cannot dispute the title of his principal. —2 B. & A. 310.

A contract, establishing between the contracting parties the relationship of principal and agent, is made absolute in law by the latter's acting under it: and an insurance broker cannot, as an agent, dispute the claim of his only known principal, on the ground that other persons were interested in the subject matter of the insurance: their claims would be a question between the assured and the persons so claiming to be interested. —9 Price, 269.

Merchants in London receive from a mere stranger abroad, a bill of lading, in a letter, requesting them to effect an insurance: they decline doing so, but *bona fide* endorsed the bill of lading to a friend of his, who fails: Held, that the merchants were liable to the consignor for the amount.—3 Camp. 472.

An agent, who applies money remitted to him, to his own use, is liable for interest; but not if he suffer it to lie dead in his hands.—2 Esp. 704.

A factor takes a security, payable to himself, from a purchaser of goods, and gives his own security to his principal, without giving the name of the purchaser: the factor cannot compel his principal to refund the money paid to him, on failure of the purchaser.—3 Camp. 291.

Where a servant was accustomed to receive debts for his master, and pay the money over without any written vouchers, the master must prove that the servant has not paid the money over, as well as that he received it.—3 Camp. 10.

An agent purchasing foreign bills for his principal, and endorsing them to him without qualification, is liable to the principal on his endorsement, however small be the commission which he gets upon the purchase.—7 Taunt. 159.—Holt, 342.

A. who was a factor for several merchants abroad, remits one bill on account of all, sending to each a draft on the fund for his share. This is a good execution of his trust and authority.—4 Dall. 136.

It is essential, however, to such remittance, that notice be given to the parties.—ibid.

Where services were originally rendered gratuitously, they cannot afterwards be made a charge.—2 Bay, 101.

If an agent locate land for himself, which he ought to locate for his principal, he is, in equity, a trustee for, and liable to account to his principal.—6 Cranch, 148.

If orders be ambiguous, they are to be taken most strongly against the principal who gave them.—1 Wash. C. C. R. 455.

SECTION VI.

Liability of the principal, for the misconduct of the agent.

The maxim, that the principal is *civilly* responsible for the acts of his agent, universally prevails, both in law and equity.—T. R. 66.

On this principle, it was held, by Holt, C. J., that a merchant was answerable for the deceit of his factor, who had sold some silk to the plaintiff, as silk of a superior quality, knowing it to be silk of an inferior quality.—Salk. 289.

But see H. 6. 53. b. cited in Bro. Abr. Actions on the case, where it was said by the court, "if my servant sell false stuff, an action on the case does not lie against me, unless he sold it through my coven, or by my command."

The principal shall answer for his factor in all cases where he is privy to the act of wrong; and so in contracts, if the factor buy goods on the account of the principal, especially where he has been used so to do, the contract of the factor will oblige the principal to a performance of the bargain.—Molloy, 423.

A principal is bound to disavow the act of his agent, the first moment that the fact comes to his knowledge;

otherwise he makes the act his own.—14 Serg. & R. 30.—But see 1 Wash. C. C. R. 455, *contra.*

As fidelity, diligence, and honesty, are expected in the factor, so the law requires the like from his employer; judging the act of the one to be the act of the other; and therefore, if a merchant shall consign counterfeit jewels to his factor, who sells and disposes of them for valuable considerations, as if they were real; if the factor suffer any loss or injury thereby, by imprisonment or other punishment, the merchant shall not only make good the damage to the factor, but also render satisfaction to the party damnified.—2 Rolls. 5. —2 Cro. 468.—Bridgman, 126, 127.—Popham, 143.

Where an agent does an act, unauthorized by his orders, the principal is not bound to ratify or disavow it, immediately after he is apprized of the circumstance: he has a right to deliberate.—1 Wash. C. C. R. 455.—But see 14 Serg. & R. 30, *contra.*

An incorporated water-works company are liable to an action on the case, where workmen employed by persons who contract with the company to lay down pipes in a public street, do the work in a negligent manner, whereby a person passing along the street receives an injury.—3 Camp. 403.—1 B. & P. 404.

But it was held that a steward, manager, or agent, was not liable, for damage done by the negligence of those employed by him in the service of his principal; for only the principal, or those actually employed, are liable.—6 Term. Rep. 411.

SECTION VII.

Revocation of the power of a factor.

In general, all persons who act by authority derived from others, may proceed to execute business until *notice* of the revocation of their authority; and their acts, between the time of revocation of their power, and of

their receiving notice of such revocation, are good. —Wallace, 126.

The relation of principal and agent, between the owner and the master of a ship, terminates with the absolute destruction of the vessel.—12 Wheat. 408.

A sale made by the principal himself is a revocation of the power of the agent to sell; and a sale made by the latter, with a knowledge of the revocation of his authority is void.—1 Wash. C. C. R. 174.

SECTION VIII.

Actions by or against the agent; and herein how far the principal may maintain an action for the price of goods sold by a factor.

Where goods have been sold by a factor, an action for the price may be maintained by him; and a payment made to him is good, unless forbidden by the principal.—5 Serg. & R. 27.

But the principal may take the collection into his own hands, and maintain an action for the price in his own name.—ibid.—7 Mass. Rep. 319.

There is no distinction, in this respect, between the case of an auctioneer, licensed under the acts of assembly, and that of a common factor. Where goods have been sold by a licensed auctioneer, the principal may maintain an action in his own name against the vendee, whether such action be for the price of the goods or for damages for not taking and paying for them.—5 Serg. & R. 19.

But it seems that so far as regards the amount of his duties and commissions, the auctioneer has the exclusive power of collection, and may forbid the principal to the extent of the sum necessary to satisfy these; and that even without such notice, a payment to the principal of the duties and commissions, would be at the peril of the payer.—ibid.

Where goods were delivered to a factor, to sell on

account of the plaintiff, and he sold a part payable in coffee, and afterwards remitted sugar on account, it was held, that the jury might presume that the proceeds of the goods had come to the hands of the factor, and therefore that the plaintiff might recover on account for money had and received.—ibid.

Where goods are purchased from a factor *scienter* (that is with *knowledge* of the circumstances) with intent by the purchaser to set off against the purchase a demand which he may have against the *factor*, the principal may, in such case, as on a sale made *immediately* by himself, have a suit against the *purchaser*, at any time before payment to the *factor*, the purchase being, as against the *principal*, fraudulent.—2 Caines' Cas. 341.

A mere navigator or pilot on board a vessel, cannot institute a suit on behalf of the owners, without some special authority.—1 Journ. of Jurisp. 131.

An action may be maintained against an agent who has received money to which his principal has no right, if the agent has had notice not to pay the money over; and, in some cases, without such notice, if the money has not been actually paid over.—7 Johns. Rep. 179.

Notice to an agent, not to pay over money wrongfully demanded and received, to his principal, is not necessary when the payment has been compulsory, and is not made expressly for the use of the principal.—9 Johns. Rep. 201.

A plaintiff, who has made a contract as agent for a third person, cannot sue as principal, without giving notice to the defendant previous to the commencement of the action, that he is the party actually interested. —5 M. & S. 383.

It was laid down by Eyre, C. J. that if a person who describes himself as agent for another residing abroad, enter into a contract in England, he is personally liable. —1 B. & P. 368.

So, where the son had appeared as the proprietor and

conductor of the business, in a trade, not an extensive one, and the father, to whom the business really belonged, was superannuated and incapable of conducting it: Held, that the son was liable, on contracts connected with the business.—1 Esp. 321.

An attorney, who signs an instrument agreeing to give up certain bills, on certain things being done, is personally liable, unless it be specially stated that he enters into the agreement as attorney or agent only.—5 Esp. 228.

An action for money lies against an agent, for money paid to him by mistake, although he has forwarded his account to his principal, and placed the sum to his credit.—3 M. & S. 344.

A factor having procured freight for a vessel of his principal, the vessel was attached, after she was loaded, for a debt due by the principal, whereby the voyage was broken up: and it was ruled that the factor was not answerable for the damages sustained by the freighters.—2 Dall. 223.

If an agent, employed to purchase property at auction, at a limited price, exceed his authority, he may be considered as purchasing on his own account, and may be sued as a purchaser.—9 Serg. & R. 212.

The consignee or factor of a vessel, who advertises her for freight, is not answerable for any damages that may occur to a shipper from a disappointment of the voyage, if the factor declared his principal, or the shipper knew that the vessel belonged to another at the time of shipment.—2 Dall. 223.—1 Yeates, 409.

A. employed by the defendant, to transport goods to a foreign market, delegates the entire employment to the plaintiff, who performs it, without the privity of the defendant: Held, that there was no privity between them, and therefore that the plaintiff was not to recover his charges, or those of his agents, from the defendant, although the latter had not paid the amount to A.—1 Marsh, 500.—6 Taunt. 147.

SECTION IX.

Rights of principal against third persons.

According to the general rule of law, a sale by a factor creates a contract between the owner and the buyer.—Str. 1182; and this rule holds, even when the factor acts upon a *del credere* commission. Hence, if a factor sells goods, and the owner gives notice to the buyer, to pay the price to him, and not to the factor, the buyer will not be justified in afterwards paying the factor; and the owner will be entitled to recover the price in an action against the buyer, unless the factor has a lien on such price.—Cowp. 251.

Quere, Has not the factor a lien on the price in the hands of the buyer, to the amount of his commission and charges?—See 5 Serg. & R. 19.

When a contract is entered into with an agent, who executes the instrument in his own name, without reference to the principal, and all the covenants are made with such agent, the principal cannot sustain an action, in his own name, upon the agreement.—3 Wash. C. C. R. 560.

SECTION X.

Evidence.

It is a general rule of evidence, that where a witness has a direct interest in the event of a cause, his testimony cannot be received: But, from necessity, an exception has been introduced, in the case of factors and brokers; because, from the nature of the transactions in which they are engaged, the contracts which they make for other persons, cannot be proved without them. Hence, it has been held, (3 Wils. 40;) that a factor is a good witness to prove the contract of sale, in an action by the principal, for the price of the goods sold: —and, in a later case.—2 H. Bl. 590; it was determined, that there was not any difference, in point of interest, between a person who sells upon commission,

and one who is to have a share of the profit; and consequently that a person who was employed to sell goods, and was to receive for his trouble whatever money he could procure for them beyond a stated sum, was a competent witness to prove the contract between the seller and buyer.

An action against an agent upon a contract with him, is not supported by evidence of a contract with the principal.—2 W. C. C. R. 219.

Where disbursements are proved to have been made by a factor for his principal, but in consequence of a loss or spoliation of his papers, the factor is unable to prove the amount, the jury may make a reasonable allowance for the disbursements.—2 Binn. 430.

THE END.

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